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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 765

CHARLES J. GREGORY AND CLYDE L. PAUL, AS A COMMITTEE FOR HOLDERS OF KENTUCKY FUEL GAS CORPORATION 6% DEBENTURES AND THE VANSTON BONDHOLDERS PROTECTIVE COMMITTEE FOR HOLDERS OF FIRST MORTGAGE BONDS OF KENTUCKY FUEL GAS CORPORATION,

Petitioners,

vs.

THE COLUMBIA GAS SYSTEM, INC., BEN WILLIAMSON, JR., AS TRUSTEE OF INLAND GAS CORPORATION AND OF KENTUCKY FUEL GAS CORPORATION, ET AL.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Record References

Petitioners have not filed a transcript of the record in this cause, but, in lieu thereof, a certified copy of the appendices filed by all parties below, has been filed as permitted by paragraph 3 of Rule 21 of the Rules of this Court together with a statement of the proceedings in the court below. Included in the statement of proceedings are copies of the motions to dismiss the appeals together with the exhibits to those motions. Accordingly, all citations to the record of this cause are to the various appendices filed below or herewith or to the exhibits to the motions to dismiss the appeals below, which are identified by reference to the party filing the same.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. _____

CHARLES J. GREGORY AND CLYDE L. PAUL, AS A COMMITTEE FOR HOLDERS OF KENTUCKY FUEL GAS CORPORATION 6½% DEBENTURES AND THE VANSTON BONDHOLDERS PROTECTIVE COMMITTEE FOR HOLDERS OF FIRST MORTGAGE BONDS OF KENTUCKY FUEL GAS CORPORATION,

Petitioners,

vs.

THE COLUMBIA GAS SYSTEM, INC., BEN WILLIAMSON, JR., AS TRUSTEE OF INLAND GAS CORPORATION AND OF KENTUCKY FUEL GAS CORPORATION, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your petitioners, Charles J. Gregory, et al., a Committee representing holders of the debentures of the Kentucky Fuel Gas Corporation and the Vanston Bondholders Protective Committee representing holders of first mortgage bonds of said corporation respectfully pray that a writ of certiorari be issued to the United States Court of Appeals for the Sixth Circuit to review the order and judgment of that Court rendered in the above cause, affirming an order of the District Court of the United States for the Eastern District of Kentucky.

Opinions Below

The District Court (Ford, J.) wrote no opinion. Its order, dated June 2, 1958, appears in Appendix A, hereto p. 1a. The opinion of the Court of Appeals for the Sixth Circuit not yet reported (Simons, J., with Miller and Martin, JJ.), appears in Appendix A, p. 4a together with the earlier opinion of the Court of Appeals which is reported at 241 F. 2d 374, and is printed in Appendix A beginning at p. 7a.

Jurisdiction

The judgments of the Court of Appeals were entered January 15, 1959 and are printed below in Appendix A at pp. 33a-36a. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and 11 U. S. C. § 47(c).

Questions Presented

I. Where, in a reorganization under Chapter X of the Bankruptcy Act (11 U. S. C. Secs. 501-676) an interest-bearing claim on first mortgage bonds was subordinated on equitable grounds to an interest-bearing unsecured claim and the assets available under the plan to pay creditors are more than sufficient to pay the principal of both claims, was the court below correct in holding that the excess assets, as a matter of law, should be applied to post-bankruptcy interest on the subordinated mortgage claim and that no post-bankruptcy interest was payable on the non-subordinated claim?

II. Was the court below correct in refusing to direct equal treatment under the plan of reorganization for the claims of petitioners and those of the noteholders of American Fuel & Power Company despite the fact that

the claims cannot be distinguished from each other for all practical and legal purposes?

Statutes Involved

The pertinent provisions of the Bankruptcy Act are set forth in Appendix B hereto, *infra*.

Statement

Because of the inequitable conduct of Columbia Gas System, Inc., formerly Columbia Gas & Electric Corporation ("Columbia") against a wrongfully acquired competitor, Columbia's claims against the competitor have by court order been subordinated to the claims of publicly held unsecured funded debt of the competitor. The petitioners are public committees representing holders of this debt. Columbia, in addition to acquiring unsecured claims against the competitor, also acquired large amounts of its first mortgage bonds with the intention of eliminating the competitor by obtaining its properties upon foreclosure sale in an equity receivership which it thereafter caused to be instituted by the filing of a creditor's bill in a Federal court. *In Re American Fuel & Power Co.* (1941) 122 F. 2d 223; *Columbia Gas & Electric Corp. v. United States, et al.* (1945) 151 F. 2d 461, *reh. denied* 153 F. 2d 101, *cert. denied* (1946) 329 U. S. 737.

As a practical matter, the only creditors of the competitor are (1) the claims of such unsecured publicly held debt and (2) Columbia's claim on the wrongfully acquired mortgage bonds. The assets of the competitor available for its creditors are sufficient to pay the principal of this publicly held unsecured debt and the principal of Columbia's bonds and also to provide a large additional balance. The court below held that as

a matter of law the subordination did not apply to interest on the first mortgage bonds acquired by Columbia and that accordingly the above-mentioned balance was payable to Columbia on account of bond interest rather than as interest on the publicly held unsecured debt. The competitor is Inland Gas Corporation ("Inland"), a part of the American Fuel & Power system and the principal operating company of that group. American Fuel & Power Company ("American") is principal stockholder of Inland and also of Kentucky Fuel Gas Corporation ("Kentucky"). Shortly prior to the equity receivership Columbia also acquired securities giving it control of the American and Kentucky companies with a view to eliminating the competition of the American system. The Inland Gas Company in recent years has been extremely prosperous but is not solvent. The claims to which Columbia's first mortgage bonds have been subordinated are the claims of the publicly held bonds and debentures of Kentucky and of the American Notes, which have been allowed as claims against Inland. It was because the interrelations of American and its two subsidiaries amounted to almost complete integration of their activities that the court below thus subordinated all of Columbia's claims against Inland, both secured and unsecured, to the claims of the public creditors of Kentucky. It declared these creditors were quasi creditors of Inland and also that the public holders of American Notes were also quasi creditors of Inland. These notes are secured by approximately 73% of the stock of Inland. 26% of the Inland stock is owned by Kentucky but not pledged although, as the principal creditors of Kentucky, the petitioners have first claim against all Kentucky assets, including the Inland stock. The plan having found Inland insolvent, its stock has

no value. See *In Re Inland Gas Corp.* (1951) 187 F. 2d 813; *In Re Inland Gas Corp.* (1954) 211 F. 2d 381, *cert. denied* (1954) 348 U. S. 840; *In Re Inland Gas Corporation* (1957) 241 F. 2d 374, *cert. denied* (1957) 355 U. S. 838, *rehearing denied* (1957) 355 U. S. 879.

When on December 2, 1930 the Federal court appointed an equity receiver of Inland it likewise appointed an equity receiver of Kentucky. Those proceedings continued until October 15, 1935 when a trustee for each company was appointed under Section 77B of the Bankruptcy Act (48 Stat. 912) and the 77B proceedings on June 22, 1938 were transformed into proceedings under Chapter X of the Bankruptcy Act.

The American Fuel & Power Company has been subjected to 77B proceedings or Chapter X proceedings since 1935.

The lower Court at 241 F. 2d 374 (1957), in holding that the public creditors of Kentucky were not entitled to post-bankruptcy interest prior to the payment of principal on the subordinated claims of Columbia placed primary reliance upon *City of New York* v. *Saper*, (1949) 336 U. S. 328, evidently believing that the latter case, which denied post-bankruptcy interest on a tax claim, presented an insuperable obstacle to post-bankruptcy interest on petitioners' claims. At the same time, the Court of Appeals failed to disturb those provisions of the plan of reorganization which awarded full post-bankruptcy interest on the claims of the holders of American Notes.*

* In that appeal no party objected to provisions of the Plan awarding post-bankruptcy interest on the American Notes since it was at that time the contention of petitioners that all public creditors (including petitioners and the American Notes) were entitled to such interest.

There were 7 separate petitions for *certiorari* filed by various parties (including petitioners herein) as a result of the opinion in 241 F. 2d rejecting the then proposed plan and returning the case to the district court. Those petitions involved a multiplicity of issues in addition to the question of petitioners' right to post-bankruptcy interest prior to payment of the principal of Columbia's subordinated claims. All of the petitions were denied, 355 U. S. 838 (October Term 1957).

Upon remand to the district court, a new Plan of Reorganization* was prepared by the Trustees. That Plan provided in part that after payment of the principal of petitioners' claims, all remaining assets of the Inland estate would be turned over to Columbia for payment on account of the principal, plus post-bankruptcy interest on its mortgage claim, despite the fact that this claim had previously been ordered subordinated to petitioners' claims. The Plan, nevertheless, while denying post-bankruptcy interest on petitioners' claims, continued to provide for full post-bankruptcy interest on the claims of the American Notes, despite the fact that the collateral securing the American Notes, i.e., Inland stock, was worthless thereby rendering the American Notes for all practical purposes unsecured. Appeals were taken to the Court of Appeals by petitioners and others. Motions were made to dismiss these appeals and the Circuit Court of Appeals handed down the opinion appealed from (App. A p. 4a), dismissing the appeals and affirming the judgment of the district court confirming the Plan of Reorganization. The petitioners now bring up this appeal on a final order.

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* Exhibit R, Harbison Motion to Dismiss filed June 25, 1958.

On May 1, 1958, the Securities and Exchange Commission, pursuant to its statutory duty under section 172 of the Bankruptcy Act (11 U. S. C. § 572) issued its Third Advisory Report in these proceedings (*In Re Inland Gas Company*, Corp. Reorg. Release No. 109, Docket No. 121).* The S. E. C. found that the Plan of Reorganization was unfair to petitioners. The decision of the court below was contrary to the S. E. C. Advisory Report.

Reasons For Granting The Writ

POINT I

The decision of the court below holding that a subordinated mortgage claim is entitled as a matter of law to post-bankruptcy interest prior to post-bankruptcy interest on a non-subordinated unsecured claim raises questions of great importance in the administration of the bankruptcy laws and is contrary to well-recognized rules of law.

(a) The importance of the issues

The basic questions are:

What are the rights of an unsecured "Deep Rock" claim to which a secured claim of a controlling wrongdoer has been subordinated? Does subordination *ipso facto* deprive the unsubordinated unsecured claim of interest? The importance of the problem need only be shown by the number of Deep Rock claims which have arisen. See *Erie Doctrine in Bankruptcy*, 66 Harv. L. Rev. 1013, 1020-24.

There has been no holding in these proceedings that the principal of the secured debt held by the wrongdoer

* Exhibit K, Harbison Motion to Dismiss filed June 25, 1958.

Columbia has a lien position senior to that of the principal of the publicly held unsecured debt of Kentucky. Instead, the holdings herein clearly mean that the principal of the former is subordinate to the principal of the latter. The necessary consequence of the subordination of Columbia's claims against Inland (including its secured claims) to the claims of the public unsecured creditors of Kentucky and American is to deny to Columbia any status or senior rights as a secured creditor. All other holders of Inland secured debt have already been fully paid and are no longer present in these proceedings. Hence we have under the plan the anomalous situation of the subordinated principal held by the wrongdoer producing priority interest, i.e., interest which outranks the claims for interest on the non-subordinated publicly held debt. The Plan shows that the principal of Columbia's secured claim against Inland amounts to $1,571,000 (Plan, p. 5) and Columbia receives under the Plan $3,021,576 (Plan, Exhibit F). The difference of approximately $1,450,000 should not go to it on account of interest. This amount must necessarily appertain to the principal claim which has been adjudicated superior to that held by Columbia, i.e., to the publicly held Kentucky debt.

We contend that where one creditor's claim has not been rejected, but is only subordinate to that of another, there can be no absolute requirement for the application of the so-called *Saper* doctrine. For example, assume an insolvent Chapter X debtor (1) has outstanding $1,000,000 of unsecured debt bearing 5% interest per annum; (2) that $500,000 of this debt is subordinated in terms to the other $500,000; (3) that there are sufficient funds to pay off the principal of all the debt; (4) that post-bankruptcy interest amounts to

$100,000 but the funds available for such interest amount to only $20,000; (5) that the only other securities outstanding are stock owned by third parties and (6) no equities have arisen by wrongful acts of security holders. We believe that the non-subordinated $500,000 should receive the $20,000 as interest. However, under the decision of the court below a contrary result is required.

A final determination of the above-mentioned question of law is of great importance in reorganization under the Bankruptcy Act and in the framing of reorganization compromises.

American Iron & Steel Mfg. Co. v. *Seaboard Air Line Railway* (1914) 233 U. S. 261, in stating that a claim for interest rises to the same rank and dignity as the claim for principal to which it relates, to us seems allied in theory with *Consolidated Rock Products Co.* v. *DuBois*, (1941) 312 U. S. 510, where this Court made it clear that interest on debts of the debtor continues to run during reorganization and rises to the same dignity as does the principal to which it relates. In fact, failure to make adequate provision for interest was held in that case to violate the strict priority rule of *Northern Pacific Ry. Co.* v. *Boyd* (1913) 228 U. S. 482 and *Case* v. *Los Angeles Lumber Products Co.* (1939) 308 U. S. 106 and constitute reversible error. Although the *Consolidated Rock Products* case was concerned largely with secured claims there is nothing to indicate that the rules there established are so limited. In that case the Court indicated that a claim for interest is entitled to the same priority as the principal to which it relates, as against a controlling stockholder holding secured claims, saying at 312 U. S. 527:

> "In the first place, no provision is made for the accrued interest on the bonds. This interest is entitled to the same priority as the principal. See *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266-267; *Ticonic National Bank* v. *Sprague*, 303 U. S. 406."

In that case the parent holding company was subordinated in its claims against its two subsidiaries to all other creditors of the subsidiaries. In subordinating the claims of the parent, Consolidated, the Court said at p. 520:

> "* * * It is plain that the bondholders [of the subsidiaries] would have, as against Consolidated and its stockholders, prior recourse against any unmortgaged assets of Union and Consumers. The full and absolute priority rule of *Northern Pacific Ry. Co.* v. *Boyd*, 228 U. S. 482, and *Case* v. *Los Angeles Lumber Products Co., supra*, would preclude participation by the equity interests in any of those assets until the bondholders had been made whole. * * *"

The language of the court in the *Consolidated Rock Products* case, as we read it, and as applied to the instant proceedings, says that the absolute priority rule requires that before the subordinated claims of Columbia may participate in any plan of reorganization of the debtor, adequate provision must have been made for the payment in full of principal and interest of the Kentucky debentures. The failure to so provide would involve a violation of the absolute priority rule in Chapter X reorganizations and constitute reversible error. See 312 U. S. 510, 523. See also *In re Aktiebolaget Krueger & Toll*, (2nd Cir. 1938) 96 F. 2d 768. The effect of the lower courts' holdings herein is not only

to permit the subordinated creditor to recover the principal of its claims but, in addition, to permit the subordinated creditor to recover post-bankruptcy interest thereon while denying all such interest to petitioners' non-subordinated claims. The novel rule thus established by the court below deserves consideration and evaluation by this Court.

(b) Conflicting Decisions of Courts of Appeal

We believe that the holding of the Court of Appeals in its latest opinion and in *In Re Inland Gas Corporation*, 241 F. 2d 374, is in conflict with the decision in *In Re Deep Rock Oil Corp.*, 10 Cir. (1940) 113 F. 2d 266, certiorari denied, *Standard Gas & Electric Co.* v. *Taylor* (1940) 311 U. S. 699. That decision confirmed a plan following an earlier Supreme Court opinion in the same proceedings, *Taylor* v. *Standard Gas & Electric Company*, (1939) 306 U. S. 307. The plan dealt with the following claims against *Deep Rock*: $10,000,000 principal amount of publicly held notes, $5,000,000 par amount of publicly held preferred stock and a large debt claim held by *Standard Gas & Electric Company* (the wrongdoing parent), which claim was subordinated to the notes and preferred stock. The opinion of the Supreme Court at 306 U. S. 307 was construed to mean that interest should be paid on the publicly held notes, and as a result *Standard* was allowed no participation in the *Deep Rock* assets.

The authorities on which *City of New York* v. *Saper*, 336 U. S. 328 (1949) is based, such as Section 63(a)(1) of the Bankruptcy Act (11 U. S. C. 103(a)(1)), were in the main existent when the *Deep Rock* case was decided. As we construe the holdings

in the instant case, the moneys used in *Deep Rock* to pay the interest on the non-subordinated unsecured public claims should instead have been used to pay down the subordinated general claim of *Standard*.

The court below, we believe, recognized the conflict between its decision at 241 F. 2d 374 and *In Re Deep Rock Oil Corp., supra,* in its following comment on that case:

> "In re Deep Rock Oil Corp., 10 Cir., 113 F. 2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U. S. 261, 34 S. Ct. 502, 58 L. Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling." 241 F. 2d 374, 383, app. A. pp. 26a, 27a.

We know of no case other than the instant one where a court has held that post-bankruptcy interest will be paid on a "subordinated" claim prior to the payment of interest on the "non-subordinated" claim. The following cases clearly stand for the rule that a claim for interest rises to the same rank and dignity as the claim for principal to which such interest relates: *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Railway,* (1914) 233 U. S. 261; *Board of Commissioners of Sweetwater County, Wyo.* v. *Bernardin,* 74 F. 2d 809 (10th Cir. 1934), *cert. denied,* (1935) 295 U. S. 731; *Spring Coal Co.* v. *Keech,* 239 Fed. 48 (4th Cir.

1916). Despite contrary assertions by Columbia and allusions thereto by the court below, it is quite clear that the latter cases have not been overruled by the *Saper* case *supra*. The last two cases were not decided within the structure of the Bankruptcy Act but were insolvency or receivership cases commenced by a bill in equity. Their strength, however, lies in their application of equitable principles and equitable principles, of course, apply under the Bankruptcy Act. Although the actual claim involved in the former case (*American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Railway*) was in the nature of a secured claim (a mechanics' lien) there is no reason to so limit its impact. Moreover the actual claim involved in *Deep Rock* was itself unsecured.

The conflict with *Deep Rock* is basic and direct and involves much more than merely the separate evaluation of equitable considerations by two different Courts of Appeal. It is not insignificant to note that in opposing the several petitions for certiorari from an earlier opinion of the lower court in these proceedings (241 F. 2d 374) Columbia stated the following at page 20 of its brief to this Court.*

> "*In re Deep Rock Oil Corp.* 113 F. 2d 266 (10th Cir.) *cert. denied*, 311 U. S. 699 (1940), held, relying, *inter alia*, on *Spring Coal* and *Bernardin*, *supra*, that priority of principal determines priority of interest on unsecured claims."

That question is exactly the issue here presented, and the issue on which the court below is in conflict with the Court of Appeals for the Tenth Circuit.

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* See Consolidated Brief of the Columbia Gas System, dated September 9, 1957, filed in Nos. 325, 336 and 342 of this Court.

The Court of Appeals has placed undue emphasis upon *City of New York* v. *Saper, supra,* a case which involved the question of payment of interest on tax claims, and upon other cases, all of which involve tax claims, which have followed and relied upon *Saper**.

We believe that it is very plain that *Saper* was not intended by this Court to affect claims for interest other than claims for interest on taxes. It is suggested that the impact of the *Saper* case is as follows:

(1) The *Saper* case involves no more than a construction of the effect of the 1926 and 1938 amendments to the Bankruptcy Act upon claims for taxes in straight bankruptcy proceedings;

(2) *Saper,* although purporting to state the general rules applicable to the question of post-bankruptcy interest, did not purport to change in even the slightest degree any of the rules regarding the payment of post-bankruptcy interest as developed in the numerous prior decisions of United States courts. *Saper* was merely an attempt to apply these rules and not an attempt to alter or modify them;

(3) The Court in *Saper* was largely concerned with the inroads that taxes and interest thereon made in the fund available for creditors in bankruptcy proceedings and noted (336 U. S. at 329, n. 5) that the question was of considerable practical importance in the administration of the Bankruptcy Act;

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* *Sword Line, Inc.* v. *Industrial Comm'r,* 212 F. 2d 865 (2d Cir. 1954), *cert. denied,* 348 U. S. 830 (1954); *New York* v. *Feinberg,* 204 F. 2d 502 (2d Cir. 1953); *Massachusetts* v. *Thompson,* 190 F. 2d 10 (1st Cir. 1951), *cert. denied,* 342 U. S. 918 (1952); *United States* v. *Edens,* 189 F. 2d 876 (4th Cir. 1951), aff'd, 342 U. S. 912 (1952); *United States* v. *General Engineering & Mfg. Co.,* 188 F. 2d 80 (8th Cir. 1951), aff'd, 342 U. S. 912 (1952).

(4) in "assimilating taxes to other debts for all purposes", the Supreme Court thereby recognized the legislative intention to modify the priority of tax claims for the purpose of reducing the claims for interest thereon *vis a vis* the claims of general creditors. The fact that the Supreme Court construed the priority given to taxes as not extending to the interest thereon under Section 64(a) of the Bankruptcy Act (11 U. S. C. § 104(a)), (a section which, incidentally, is expressly inapplicable in Chapter X (Section 102, 11 U. S. C. § 502)), has no application to the status of non-tax priority claims, the recognition of which is not affected by Section 64. The plain fact is that in assimilating taxes to other debts, the Supreme Court was assimilating taxes to unsecured debts having no priority and there is nothing in *Saper* which implies that all claims otherwise entitled to priority should likewise be assimilated to other debts having no priority.

Petitioners' views as to the impact of *City of New York* v. *Saper, supra,* and as to the correctness of the decisions of the court below are in accordance with the views expressed in recent law review comment on the case at 241 F. 2d 374. See note, *Post-Bankruptcy Interest in Chapter X Reorganization*, 67 Yale L. J. 1131 (1958).

The issue here presented as to whether a subordinated claimant is entitled to payment of post-bankruptcy interest prior to payment of post-bankruptcy interest on non-subordinated unsecured claims is one of great importance in the administration of the bankruptcy laws and one which, although, we believe, implicitly treated in leading decisions of this Court, has not been expressly considered and settled. As shown above, to the extent that this issue has been considered by the

various courts of appeals, the decision below has resulted in conflict among the circuits.

Unless certiorari is granted herein, we fear that the *Saper* case may be held to mean that a bankruptcy reorganization court under no circumstances may exercise its equity powers to allot funds available for post-bankruptcy interest to unsecured creditors rather than to a subordinated secured creditor. If the *Saper* case is so construed we believe that it would overrule the following language from *Vanston v. Green* (1946) 329 U. S. 156 where this court dealt with the payment of interest on interest on the Inland bonds.

> "It is manifest that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between creditor and creditor or between creditors and the debtor. See *Sexton* v. *Dreyfus, supra,* at 346. That the proceedings before us have moved from equity receivership through § 77B to Chapter X in the wake of statutory change does not make these equitable considerations here inapplicable. A Chapter X or § 77B reorganization court is just as much a court of equity as were its statutory and chancery antecedents. See *Consolidated Rock Products Co.* v. *Du Bois,* 312 U. S. 510, 527." (329 U. S. at 165).

POINT II

The refusal of the court below to order equal treatment for the legally indistinguishable claims of petitioners and of the American Notes is contrary to the basic principles underlying the Bankruptcy Act.

The Plan provides that there shall first be applied to the American Notes assets of American available for that purpose. The balance due on these Notes,

including full post-bankruptcy interest on said Notes to date, is then to be paid out of the Inland assets. Under the valuation accorded the assets of American, it is apparent that in order to pay post-bankruptcy interest on the American Notes a substantial portion of the Inland estate will be drawn upon. We contend that the granting of such post-bankruptcy interest cannot be justified while such interest is denied the public creditors of Kentucky since no significant legal distinction exists between the claim of petitioners and the claims of the American Notes:

(a) Both claims were awarded quasi-creditor status and received their recognition by virtue of the lower courts' decisions subordinating Columbia's claims to the claims of the public creditors of American, Inland and Kentucky;

(b) Both claims, for all realistic purposes, are unsecured. The American Noteholders, it is true, have the benefit of a pledge of approximately .73% of the stock of Inland.* Admittedly, if the 73% of the Inland stock has value, then all of such value inures to the benefit of the American Noteholders' claims. However, since the plan expressly states Inland is insolvent this stock is worthless and no significance attaches by reason of the asserted pledge. Moreover, since petitioners are entitled to primary participation in any assets owned by Kentucky, their rights in the Inland

* It should be noted that even if the American Noteholders' assertions as to the validity of the pledge are true, they cannot be considered as secured creditors of Inland since Section 1(28) of the Bankruptcy Act (11 U. S. C. § 1(28)) limits the definition of a secured creditor to a creditor who has security for his debt upon the property of the bankrupt. A secured creditor is not any creditor with security but only a creditor with security upon property of the bankrupt.

stock owned by Kentucky are coextensive with the rights of the American Noteholders in the Inland stock owned by American. Under the rules adopted by the court below, and by courts generally, the holders of American Notes would be entitled to post-bankruptcy interest only if their holdings of Inland stock or the income therefrom were valuable enough to cover both principal plus interest, *In re Inland Gas Corp.*, 241 F. 2d 374, *cert. denied* 355 U. S. 838 (1957); *In re Macomb Trailer Coach*, 200 F. 2d 611 (6th Cir. 1952) *cert. denied*, 345 U. S. 958 (1953). This is also the clear meaning of Section 197 of the Bankruptcy Act (11 U. S. C. § 597).

(c) The claims of petitioners and of the American Notes both result from loans of cash to the respective debtors by innocent public creditors. In both instances the cash was used for the benefit of the Inland estate. Thus, the equitable as well as the legal rights of both classes of creditors are the same.

To allow post-bankruptcy interest on the claims of the American Notes while denying post-bankruptcy interest on the legally identical claims of petitioners casts doubt upon the most basic principles of bankruptcy and corporate reorganizations which require that creditors of the same rank and priority be given equal treatment. Under the law this concept of equal treatment for equal claims is one which has found expression in numerous cases decided by the Supreme Court of the United States and by courts of the various circuits. Accordingly it is submitted that in failing to require equal treatment for the American Notes and the claims of petitioners the decision below threatens well-established principles of law enunciated by this Court,

see *Prudence Realization Corp. v. Geist*, 316 U. S. 89 (1942); *Case v. Los Angeles Lumber Products Co., Ltd.*, 308 U. S. 106 (1939). This question of whether a creditor holding worthless collateral may be accorded preferred treatment over another creditor of equal rank and dignity is one of grave importance to the impartial and orderly administration of the bankruptcy laws.

Equal treatment for the American Notes and petitioner's claims requires one of the following results:

(1) Both claims should be granted post-bankruptcy interest; or

(2) Neither claim should be granted post-bankruptcy interest.

Recognition of the foregoing must necessarily involve consideration of the more general question which pervades these proceedings namely, whether post-bankruptcy interest may be paid on the claims of an unsecured creditor prior to payment of principal on account of the claims of a subordinated creditor whose subordination has resulted from grossly inequitable conduct causing irreparable damage to other creditors. This broader question of post-bankruptcy interest was one of the questions presented to this Court in the several prior petitions for certiorari resulting from the opinion of the Sixth Circuit Court of Appeals at 241 F. 2d 374 where it rejected a plan. At that time the decree of the District Court then under consideration was not a final order. The decree here involved is final and the present proceeding is the last opportunity available to petitioners to seek clarification of the important questions here involved.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: March 11, 1959

APPENDIX A

Order of H. Church Ford, U.S.D.C.J. dated June 2, 1958, from which appeal was taken to United States Court of Appeals for the Sixth Circuit.

On May 28, 1958, pursuant to recess taken on May 9, 1958, as provided in an order entered herein on May 13, 1958, and pursuant to lawful notice, this cause came on for the consideration of the confirmation of the "Plan of Reorganization dated February 25, 1958," as amended by an order entered herein on April 7, 1958, which Plan had been found by this Court to be fair and equitable and feasible under Section 174 of the Acts of Congress relating to bankruptcy.

Thereupon Ben Williamson, Jr., Trustee of Inland Gas Corporation and Kentucky Fuel Gas Corporation, by his counsel, tendered and asked leave to file the acceptance dated May 16, 1958, of said Plan by The Columbia Gas System, Inc., together with a proof of claim attached thereto, and, it appearing proper so to do, it is ORDERED that the same be filed herein.

Thereupon said Ben Williamson, Jr., Trustee, by his counsel, proposed that the first sentence of Section 1 of Article XII of said Plan, relating to tax ruling and closing agreement, be amended by deleting the words "confirmed by the Court" and substituting therefor the word "consummated," and The Columbia Gas System, Inc., by its counsel, having no objection to said amendment, and it appearing that said amendment does not materially and adversely affect the interests of creditors or stockholders, it is ORDERED that said Plan be amended as proposed.

Thereupon the Court heard argument of counsel for various parties with respect to the confirmation of said Plan and the objections thereto, and at the conclusion

Order of H. Church Ford, U.S.D.C.J. dated June 2, 1958, from which appeal was taken to United States Court of Appeals for the Sixth Circuit

of all of such argument the Court, having carefully considered said Plan and all objections thereto and having carefully considered said argument and all briefs heretofore filed herein and the advisory report of the Securities and Exchange Commission heretofore filed herein, and being fully advised in the premises, is of the opinion:

(a) that notice of this confirmation hearing has been duly given as required by said order of this Court entered on May 13, 1958, and in compliance with Section 179 of the Bankruptcy Act,

(b) that The Columbia Gas System, Inc., has duly accepted said Plan in a writing filed herein,

(c) that the provisions of Article VIII, Section 199, and Article X of Chapter X of the Bankruptcy Act have been complied with,

(d) that said Plan is fair and equitable and feasible,

(e) that the proposal of said Plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by the Bankruptcy Act,

(f) that all payments made or to be made by the Debtors, the Reorganized Company, or any other person or corporation, for services and for costs and expenses in or in connection with these proceedings or in connection with said Plan and incident to the reorganizations, have been or will be disclosed to the Judge and will be subject to the approval of the Judge, and

Order of H. Church Ford, U.S.D.C.J. dated June 2, 1958, from which appeal was taken to United States Court of Appeals for the Sixth Circuit

(g) that it would be impracticable at this time for the Judge of this Court to appoint the escrow agent who is to receive, hold, and vote the stock of the Reorganized Company, and therefore the Court reserves jurisdiction to pass upon the identity, qualifications, and affiliations of said escrow agent and the persons who are to be directors or officers of the Reorganized Company.

WHEREFORE, IT IS ADJUDGED, ORDERED, AND DECREED:

1. That all objections to said Plan and to the confirmation thereof are hereby overruled.

2. That the Debtors, and each of them, are insolvent.

3. That the Plan of Reorganization dated February 25, 1958, as amended by an order entered herein on April 7, 1958, and as amended by this order, be, and it is hereby, confirmed.

4. That the Court reserves jurisdiction to determine all other matters in connection with the consummation of said Plan.

Dated May 28th, 1958

Enter:

s/ H. CHURCH FORD
United States District Judge

A True Copy Attest

DAVIS T. McGARVEY
Davis T. McGarvey, Clerk
U. S. District Court

Opinion of United States Court of Appeals for the Sixth Circuit dated January 15, 1959.

Nos. 13,657-13,663, Incl.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

In the Matter of: Inland Gas Corporation, Kentucky Fuel Gas Corporation, American Fuel & Power Company, *Debtors.*	Appeal from the United States District Court for the Eastern District of Kentucky.

Decided January 15, 1959

Before Simons, Martin and Miller, Circuit Judges.

Per Curiam. These cases have been heard on motions of the trustee of American Fuel & Power Company [supported by the Columbia Gas Systems, Inc., the Green Committee for Independent American Fuel Note Holders, and the trustees of the debtors, Inland Gas Corporation and Kentucky Fuel Gas Corporation] to dismiss the appeals in these seven cases, which were heard together, and on the opposition of the Securities and Exchange Commission and the several parties joining it in opposition to the dismissal of the appeals. This opposition, of course, involves opposition to the plan adopted in the district court and to its confirmation.

Opinion of United States Court of Appeals for the Sixth Circuit dated January 15, 1959

This appellate court has heard oral arguments of four attorneys in favor of the motions to dismiss and those of five attorneys opposing the dismissals. There have been considered also some twenty briefs filed by the attorneys for and against the motions.

The full history of this long-drawn-out litigation is disclosed by the numerous opinions of this court: *In re American Fuel & Power Company*, 122 F. (2d) 223 (C. A. 6); *Columbia Gas & Electric Corporation* v. *United States*, 151 F. (2d) 461 (C. A. 6); *In re American Fuel & Power Company, et al.*, 151 F. (2d) 470, affirmed by the Supreme Court, sub nom *Vanston Committee* v. *Green*, 329 U. S. 156; *Columbia Gas & Electric Corporation* v. *United States, et al.*, 153 F. (2d) 101 (C. A. 6); *In re Inland Gas Corporation, et al.*, 187 F. (2d) 813 (C. A. 6); *In re Inland Gas Corporation, et al.*, 208 F. (2d) 13 (C. A. 6); *In re Inland Gas Corporation; Harbison* v. *Williamson, et al.; Vanston* v. *Williamson, et al.; Kern* v. *Williamson, et al.; Green, et al.*, v. *Vanston, et al.*, 211 F. (2d) 381 (C. A. 6), certiorari denied, sub nom *Kern* v. *Vanston*, 348 U. S. 840; *In re Inland Gas Corporation, et al.*, 217 F. (2d) 207 (C. A. 6); *In re Inland Gas Corporation, et al.*, 241 F. (2d) 274 (C. A. 6), certiorari denied 355 U. S. 838 (1957).

Upon the last remand to the United States District Court, District Judge Ford had a full hearing with all interested parties appearing by counsel to consider whether a proposed plan, presented by the trustees of the several debtor corporations involved, is fair, equitable and feasible. Upon conclusion of the hearing, the district court entered an order finding the plan fair, equitable and feasible.

Opinion of United States Court of Appeals for the Sixth Circuit dated January 15, 1959

On June 2, 1958, the United States District Court entered an order confirming the plan of reorganization and overruling all objections to the plan and to its confirmation. It is obvious that the district judge attempted to the best of his ability and understanding—and we think successfully—to apply the principles stated in our last opinion [241 F. (2d) 374] and to put into full effect the mandate of this court. The evaluation which he put on the properties in issue was supported by substantial evidence and it cannot be said that his decision to follow the evaluation which he adopted upon expert testimony, rather than that of the Securities and Exchange Commission, was clearly erroneous. On the contrary, we find that the district judge exercised sound discretion in adopting the evaluation which he did, upon the basis of the expert evidence before him.

We are of opinion, further, that Judge Ford appropriately applied the adjudication of this court in 241 F. (2d) 374, with respect to post-bankruptcy interest and all other issues before him. Motions to dismiss are appropriate in the circumstances. *Long Beach Dock & Terminal Co.* v. *Pacific Dock & Terminal Co.*, 98 F. (2d) 833, 835 (C. A. 9), certiorari denied 305 U. S. 1020; *Securities and Exchange Commission* v. *Vacuum Can Co.*, 157 F. (2d) 530, 532 (C. A. 7), certiorari denied 330 U. S. 820.

The appeals are dismissed; and the judgment of the district court confirming the plan of reorganization is affirmed

Opinion of United States Court of Appeals for the Sixth Circuit, dated February 14, 1957 (241 F. 2d 374).

In re INLAND GAS CORPORATION, Debtor.
In re KENTUCKY FUEL GAS CORPORATION, Debtor.
In re AMERICAN FUEL & POWER COMPANY et al., Debtors.
Nos. 12861-12867.

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge.

After more than twenty six years of Receiver and Trustee operation of the Debtors' properties, of litigation delaying reorganization under Chapter X of the Bankruptcy Act, 11 U.S.C.A. § 501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas & Electric Corporation v. United States, 6 Cir., 131 F. 2d 461, modification denied, 6 Cir., 133 F. 2d 101, certiorari denied 329 U. S. 737, 67 S. Ct. 48, 91 L. Ed 636; In re

Opinion of United States Court of Appeals for the Sixth Circuit, dated February 14, 1957

Inland Gas Corporation, 6 Cir., 187 F. 2d 813; In re Inland Gas Corporation, 6 Cir., 208 F. 2d 13; In re Inland Gas Corporation, 6 Cir., 211 F. 2d 381, certiorari denied Kern v. Williamson, 348 U. S. 840, 75 S. Ct. 45, 99 L. Ed. 662; In re Inland Gas Corporation, 6 Cir., 217 F. 2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930 by an equity receivership, followed since October 15, 1935 by proceedings under § 77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that chapter, a Plan entitled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable and feasible, by the District Court, in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Court circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modifications. The important new developments consisted of a substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets of the corporations with the amount of the offer to con-

stitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so, the appellant, Trustee of Inland, applied to the Commissioner of Internal Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 337, and that no gain or loss should under its provisions be recognized. A later and better bid was thereafter received from the Tennessee Gas Transmission Company which offered $8,000,000.00 in cash for the same properties which it confirmed by a deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganization, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as

subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation for the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purposes of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decision is correct, the Federal tax involved would be approximately $1,192,000.00. In objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally as grounds for his objections, upon these rulings and as an assumed result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures

through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a declaratory judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U.S.C.A. §§ 2201, 2202, it was without jurisdiction to entertain it. Whereupon, it ordered that the petition of the Trustee be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors, were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and

cannot pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganized corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as evidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

Opinion of United States Court of Appeals for the Sixth Circuit, dated February 14, 1957

The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of § 337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and within the twelve months period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unnecessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commissioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed," so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive

relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in a Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for a successful and prompt reorganization by the $8,000,000.00 offer received by Tennessee. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses effectiveness by the withdrawal of the Tennessee offer and the release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the petitions.

or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201 Tit. 28 U.S.C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421 of the Internal Revenue Code of 1954, 26 U.S.C.A. § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1, 2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C.F.R. § 1.337-2(b). The problem with which § 337 was concerned arose out of the decisions in Commissioner v. Court Holding Co., 324 U.S. 331, 65 S.Ct. 707, 89 L.Ed. 981, and United States v. Cumberland Public Service Co., 338 U.S. 451, 70 S.Ct. 280, 94 L.Ed. 251, and the Section was enacted to avoid nice distinctions between whether property was sold by a corporation or in reality by its shareholders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as

to whom the assets are to be distributed. It may require clarification but that must await the happening of the taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of § 337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in § 7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re American Fuel & Power Co., 6 Cir., 151 F. 2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds, issued by Inland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F.2d 813, 819, we said: "The order will be amended by direction to subordinate the claims of Columbia to the public

holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered to those rulings. 217 F.2d 207. Following them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law,

interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule. (1) If the alleged bankrupt proves solvent, post-bankruptcy interest is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bankruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period a difference of opinion as to allowance of interest on tax claims. They were considered in some jurisdictions as claims of higher dignity than general claims. This difference has now been resolved by the City of New York v. Saper, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the light of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. "It is manifest," said Mr. Justice Black, for the majority, in Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 67 S. Ct. 237, 241, 91 L. Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy

receivership and reorganization has been the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell v. Imperial Paper & Color Corporation, 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293, In re Deep Rock Oil Corporation, 10.Cir., 113 F.2d 266, certiorari denied, Standard Gas & Electric Co. v. Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, and its predecessor; Taylor v. Standard Gas & Electric Co., 306 U. S. 307, 618, 59 S. Ct. 543, 83 L. Ed. 669, that, as said in Sampsell, 313 U. S. at page 219, 61 S. Ct. at page 907, "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further observation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F. 2d 381, 384: "It would be not only an anomaly but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation,

for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan of reorganization, which may or may not contain a provision for sale of the properties, or which may or may not submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems here involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted, we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debentures ask us to dismiss the petition of the Allen Committee on the

ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our holdings herein. The writer thinks it sufficient, therefore, to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12865, and to direct that a single mandate be entered in each of the appeals amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Ken-

tucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, Circuit Judge.

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U.S. 156, 163, 67 S.Ct. 237, 91 L.Ed. 162; Sexton v. Dreyfus, 219 U.S. 339, 344, 31 S.Ct. 256, 55 L.Ed. 244; City of New York v. Saper, 336 U.S. 328, 330-331, 69 S.Ct. 554, 93 L.Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves

solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U.S. 261, 267, 34 S.Ct. 502, 58 L.Ed. 949; City of New York v. Saper, supra, 336 U.S. 328, at page 330, 69 S.Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principle (sic) of the debt secured, the excess should be applied to post-bankruptcy interest on the obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F.2d 611, 613, certiorari denied McInnis v. Weeks, 345 U.S. 958, 73 S.Ct. 940, 97 L.Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U.S. 215, 61 S.Ct. 904, 85 L.Ed. 1293 and Pepper v. Litton, 308 U.S. 295, 60 S.Ct. 238, 84 L.Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp., 5 Cir., 149 F.2d 199, 200. A denial of this right is in substance a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On the contrary, such a contention appears to me to be expressly rejected by the Supreme Court

in City of New York v. Saper, supra, 336 U.S. 328, 69 S.Ct. 554, 93 L.Ed. 710. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U.S.C.A. The Court said 336 U.S. at page 337, 69 S.Ct. at page 559: "The Court of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§ 64, sub. a, and 57, sub. n [11 U.S.C.A. § 93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X, United States v. Edens, 4 Cir., 189 F.2d 876, affirmed 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682. See also: United States v. General Engineering & Mfg. Co., 8 Cir., 188 F.2d 80, affirmed 342 U.S. 912, 72 S.Ct. 358, 96 L.Ed. 682; Pavone Textile Corp. v. Bloom, 302 N.Y. 206, 97 N.E.2d 755, affirmed sub nom., United States v. Bloom, 342 U.S. 912, 72 S.Ct. 357, 96 L.Ed. 682; Commonwealth of Massachusetts v. Thompson, 1 Cir., 190 F.2d 10, certiorari denied 342 U.S. 918, 72 S.Ct. 364, 96 L.Ed. 686; Sword Line v. Industrial Commissioner, 2 Cir., 212 F.2d 865, certiorari denied 348 U.S. 830, 75 S.Ct. 53, 99 L.Ed. 654; National Foundry Co. of New York v. Director of Internal Revenue, 2 Cir., 229 F.2d 149. The exception was not recognized by this Court in New York Trust Co. v. Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison v. Federal Deposit Insurance Corp.,

supra, 5 Cir., 149 F.2d 199; United States v. Paddock, 5 Cir., 187 F.2d 271, 276; Application of Progress Shoe Co., D.C.E.D.N.Y., 107 F.Supp. 114, 116; Squire v. American Express Co., 131 Ohio St. 239, 260, 2 N.E.2d 766.

Appellants rely upon Vanston Bondholders Protective Committee v. Green, supra, 329 U.S. 156, 67 S.Ct. 237, 240, 91 L.Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims. The Court pointed out, 329 U.S. at page 166, 67 S.Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F.2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U.S. 699, 61 S.Ct. 138, 85 L.Ed. 453, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 953,

which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, Circuit Judge.

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congress has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

The Declaratory Judgments Act, section 2201 of Title 28, U.S.C. provides: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States * * * upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

Opinion of United States Court of Appeals for the Sixth Circuit, dated February 14, 1957

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the Declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to petition the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies; and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court sitting in bankruptcy to entertain a trustee's petition for instructions is not founded upon that Act. But the *source* of the jurisdiction is unimportant where juris-

diction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the fact that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott v. Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule." The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England. * * *"

Study of the history of the Act reveals that the words "except with respect to Federal taxes" upon

which this issue turns were not a part of the original statute, but were inserted by amendment in 1935. 49 Stat. 1027. Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori*, an express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he, as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the Bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U.S.C., as follows: "§ 960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee of the debtor corporations is on the same footing with any other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solvent* corporation engaged in a reorganization may have an equally large amount of tax liability, contingent upon the outcome of litigation subsequent to the occurrence of a potentially taxable event. There

is no reason why an *insolvent* corporation should be in a preferred position. The possible loss of a favorable business transaction is insufficient reason of itself to create the extraordinary circumstances necessary for the injunctive relief sought by appellant. The Internal Revenue Code of 1954, section 7421, states the general rule: "(a) Tax. * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." This restraint against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a suit may be maintained to enjoin the collector." Miller v. Standard Nut Margarine Co., 284 U.S. 498, 509, 52 S.Ct. 260, 263, 76 L.Ed. 422.

This court has held that any exception to the universality of the application of section 7421 of the Internal Revenue Code must turn upon "present extraordinary and entirely exceptional circumstances." John M. Hirst & Co. v. Gentsch, 6 Cir., 1943, 133 F.2d 247, 248. We stated there that the "circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued." In my judgment, departure from the clear statutory prohibition is not warranted in the present circumstances.

Inasmuch as the United States District Court had no jurisdiction over the subject matter in the tax phase

of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commissioner as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reasons stated by him, that post-bankruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax liability for lack of jurisdiction should, in my judgment, be affirmed.

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 13,658

THOMAS H. CHOATE and HARMON L. REMMEL, etc.,
Appellants,

v.

BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, et al.,
Appellees.

Before: SIMONS, MARTIN, and MILLER, *Circuit Judges.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal be and it is dismissed; and the judgment of the District Court confirming the plan of reorganization is affirmed.

Approved for entry:

/s/ JOHN D. MARTIN
U. S. Circuit Judge

FILED
January 15, 1959

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,659

CHARLES J. GREGORY and CLYDE L. PAUL, ETC.,
Appellants,

v.

BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, et al.,
Appellees.

Before: SIMONS, MARTIN, and MILLER, *Circuit Judges.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal be and it is dismissed; and the judgment of the District Court confirming the plan of reorganization is affirmed.

Approved for entry:

/s/ JOHN D. MARTIN
U. S. Circuit Judge

FILED
January 15, 1959

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

No. 13,661

THOMAS H. CHOATE and HARMON L. REMMEL, etc.,
Appellants,

v.

BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, et al.,
Appellees.

Before: SIMONS, MARTIN, and MILLER, *Circuit Judges.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal be and it is dismissed; and the judgment of the District Court confirming the plan of reorganization is affirmed.

Approved for entry:

/s/ JOHN D. MARTIN
U. S. Circuit Judge

FILED
January 15, 1959

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,663

CHARLES J. GREGORY and CLYDE L. PAUL, ETC.,
Appellants,

v.

BEN WILLIAMSON, JR., Trustee of Inland Gas Corporation, et al.,
Appellees.

Before: SIMONS, MARTIN, and MILLER, *Circuit Judges.*

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

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Approved for entry:

/s/ JOHN D. MARTIN
U. S. Circuit Judge

FILED
January 15, 1959

APPENDIX B

Statutes

The pertinent provisions of the Bankruptcy Act, 52 Stat. 840 (1938), 11 U. S. C. 1 *et seq.* (1952), are as follows:

Section 1(28), 11 U. S. C. §§ 1 (28): Meaning of Words and Phrases. The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * * *

(28) "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets; * * *.

Section 63a (1), 11 U. S. C. § 103a (1): Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date * * *.

Section 102, 11 U. S. C. § 502: The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be

proceeded with pursuant to the provisions of chapters I to VII, inclusive * * *

Section 197, 11 U. S. C. § 597: For the purposes of the plan and its acceptance, the judge shall fix the division of creditors and stockholders into classes according to the nature of their respective claims and stock. For the purposes of such classification, the judge shall, if necessary, upon the application of the trustee, the debtor, any creditor, or an indenture trustee, fix a hearing upon notice to the holders of secured claims, the debtor, the trustee, and such other persons as the judge may designate, to determine summarily the value of the security and classify as unsecured the amount in excess of such value.

Section 216, 11 U. S. C. § 616: A plan of reorganization under this chapter—

(1) shall include in respect to creditors generally or some class of them secured or unsecured, and may include in respect to stockholders generally or some class of them, provisions altering or modifying their rights, either through the issuance of new securities of any character or otherwise;

(2) may deal with all or any part of the property of the debtor; * * *

* * *

(5) shall specify what claims, if any, are to be paid in cash in full; * * *

Section 221, 11 U. S. C. § 621: The judge shall confirm a plan if satisfied that—

* * *

(2) The plan is fair and equitable, and feasible; * * *

FILE COPY

FILED
MAR 13 1959
JAMES R. BROWNING, Clerk

No. 766

IN THE

Supreme Court of the United States

October Term, 1958

PAUL E. KERN,

Petitioner,

—v.—

THE COLUMBIA GAS SYSTEM, INC., ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

GEORGE ZOLOTAR,
521 Fifth Avenue,
New York 17, N. Y.,

LEO T. WOLFORD,
501 South Second Street,
Louisville 2, Ky.,
Counsel for Petitioner.

March, 1959.

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IN THE

Supreme Court of the United States

October Term, 1958

No.

PAUL E. KERN,

Petitioner,

—v.—

THE COLUMBIA GAS SYSTEM, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled case on January 15, 1959.

Opinions Below

The initial opinions of the Court of Appeals are reported at 241 F. 2d 374 and are printed in Appendix B, *infra*, pp. 7b-27b. On that occasion, a majority of the court below (Simons, *C. J.*, dissenting), by affirming the order (without opinion) of the District Court for the Eastern District of Kentucky, remanded the case for the formulation of a new plan of reorganization. Petitions for writs of certiorari from the non-final judgments of the courts below were

denied at 355 U. S. 838, 879. The oral opinion of the District Court (A. 191a-194a), pursuant to which final judgments resulting from the remand were entered, is not reported.[1] The latest opinion of the Court of Appeals is printed in Appendix B, *infra*, pp. 28b-30b, and is not yet reported.

Jurisdiction

The final judgments of the Court of Appeals, which petitioner seeks to review, are dated January 15, 1959 and were entered on that day (p. 31b *infra*). On February 12, 1959 the Court of Appeals stayed its mandate pending application for certiorari. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Whether the rules governing the allowance of post-bankruptcy interest in straight bankruptcy and liquidation proceedings, particularly as applied to tax claimants, are controlling in corporate reorganizations and, if so, whether they so restrict the ordinary demands of the absolute priority rule and the equitable doctrine of subordination as to render the reorganization court powerless to grant post-petition interest to public security holders in priority to the subordinated claims for principal and interest of a faithless parent adjudged guilty of injuring the investing public.

2. Where the assets administered by the reorganization court are more than sufficient to meet both the principal

[1] The record on this petition, consisting of the parties' appendices and proceedings in the court below, is the same as that filed by the Committee for Holders of Kentucky Fuel Gas Corporation 6½% Debentures and the Vanston Bondholders Protective Committee with their joint petition to review identical judgments. Page references to this petitioner's appendix are shown as "A."

of the prior claims of public security holders and the principal of the subordinated claims of a faithless parent, whether the remaining surplus must be awarded first, in the usual order of priority, to the public security holders on account of their unpaid claims for interest or whether the priorities may be reversed and the entire surplus awarded to the faithless parent as post-petition interest on its subordinated claims because, prior to its subordination, the parent was a secured creditor.

Statutes Involved

The pertinent provisions of the Bankruptcy Act are set forth in Appendix A, *infra*, pp. 1b-6b.

Statement

The case arises in proceedings under Chapter X of the Bankruptcy Act (11 U. S. C. § 501 *et seq.*) for the reorganization of the American System, consisting of three principal debtors: American Fuel & Power Company ("American"), the holding company, and its subsidiaries, Inland Gas Corporation ("Inland") and Kentucky Fuel Gas Corporation ("Kentucky"), both formerly operating companies. All three companies, which had sold debt securities to the investing public, came under the domination and control of Columbia Gas and Electric Corporation, subsequently renamed The Columbia Gas System, Inc. ("Columbia"). As part of a scheme for gaining control of the American System and thus eliminating the threat of competition, Columbia acquired at sizeable discounts substantial amounts of the Inland, Kentucky and American debt securities, as well as stock and other interests. It promptly sought to wreck the debtors by throwing them into judicial proceedings.

The present proceedings were instituted in 1935 under Section 77B of the Bankruptcy Act (11 U. S. C. § 207), the predecessor of Chapter X. These supplanted the abortive federal equity receiverships for Inland and Kentucky instigated by Columbia in 1930 and a Delaware state court receivership for American instituted in 1934.

During the proceedings conducted under the Bankruptcy Act, it was determined that Columbia's inequitable conduct required that all of its claims against each of the debtors be subordinated to "the claims of all other creditors of every class" in the American System.[2] This was the culmination of findings that Columbia "drew to itself the lifeblood of all the debtors and picked the flesh from the bones of these corporate entities," that its abhorrent and immoral scheme violated the Federal antitrust laws and that the result of its misconduct was "to defraud the minority interests of the debtors."[3]

Originally, in litigation involving a proposed compromise with Columbia, it was decreed that Columbia's claims "be rejected" and that it "take nothing thereby".[4] Later, in a direct controversy with Columbia as a party, its illegal conduct was again condemned; however, influenced by the circumstance that in no event would Columbia participate in the reorganization under the financial facts then existing, the court below acquiesced in the suggestion that Columbia's claims be subordinated rather than rejected.[5] In the

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[2] *Columbia Gas & Electric Corp. v. United States*, 151 F. 2d 461, 470; 153 F. 2d 101; *In re Inland Gas Corp.*, 187 F. 2d 813, 817.

[3] *In re American Fuel & Power Co.*, 122 F. 2d 223, 228, 229; *In re Inland Gas Corp., supra*, 187 F. 2d at 815.

[4] *In re American Fuel & Power Co., supra*, 122 F. 2d at 229.

[5] *Columbia Gas & Electric Corp. v. United States, supra*, 151 F. 2d at 470; 153 F. 2d 101; *In re Inland Gas Corp., supra*, 187 F. 2d at 815.

ensuing years since 1945, when this decision was reached, the estates have been operated successfully by their trustees and there have been material improvements in the system earnings and large increases in the value of the assets. As a result, it was possible to distribute some $10,250,000 in full payment, with post-petition interest to the date of payment, of the senior claims of Inland's direct public creditors. At December 31, 1957, the Securities and Exchange Commission ("S. E. C."), which is a party to these proceedings with statutory functions pursuant to Section 208 of Chapter X (11 U. S. C. § 608), valued the remaining estate (after allowing for estimated reorganization expenses) at more than $12,000,000 (S. E. C. Rep. 18-30).[6] During the preceding five years the cash throw-off approximated $1,250,000 to $1,500,000 per year (*Id.* App. 1) and cash is continuing to accumulate at the same rate (A. 212a).

Until recently it was assumed that the residual assets would be shared solely by the remaining public creditors in the System (the public holders of the American Notes and the Kentucky Bonds and Debentures), without dilution on the part of subordinated Columbia.[7] However, in its opinions at 241 F. 2d 374 (pp. 7b, 15b, 19b *infra*), a majority of

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[6] The references are to pages of the Report of the S. E. C., submitted pursuant to Section 173 of Chapter X (11 U. S. C. § 573), in the form filed in the District Court. *In the Matter of Inland Gas Corporation et al.*, Third Advisory Report of the Securities and Exchange Commission on Proposed Plan of Reorganization, May 1, 1958, CORPORATE REORGANIZATION RELEASE No. 109, C. C. H. BANKRUPTCY L. REP. ¶59,212, not yet officially reported. By permission of the court below, the SEC Report and the Trustees' Plan dated February 25, 1958, as amended ("Plan"), which are part of the record on appeal, were not reproduced in the appendices. The Plan, which has received the approval of the courts below, is predicated upon a valuation for the same assets of $10,538,800.

[7] *In re Inland Gas Corp.*, 187 F. 2d 813; 211 F. 2d 381.

the Court of Appeals, affirming a *sua sponte* decision of the District Court, rejected a plan submitted by the Trustees which provided for such a disposition. The ruling of the majority was that the Kentucky public creditors, being unsecured, were not entitled to post-petition interest in priority to subordinated Columbia.[8] The view taken was that this result was dictated by this Court's decisions concerning tax claims in *City of New York* v. *Saper*, 336 U. S. 328, and *United States* v. *Edens*, 342 U. S. 912. The court below rejected arguments that the absolute priority rule which prevails in corporate reorganizations and the complete powers of subordination possessed by bankruptcy courts do not tolerate, let alone require, this inequitable consequence to public creditors.

As a public holder of Kentucky Bonds and Debentures, this petitioner, together with protective committees representing Kentucky public creditors, and supported by the S. E. C., urged this Court to grant certiorari even though the then judgments of the courts below were non-final since they merely remanded the case for the formulation of a new plan. October Term 1957, Nos. 325, 336, 342. The petitions and rehearing were denied. 355 U. S. 838, 879. In subsequent proceedings, the Kentucky representatives and the S. E. C. have preserved their right to raise the basic question on review of final judgments (A. 6a, 13a-14a, 23a-26a; S. E. C. Rep. 31). See *United States* v. *U. S. Smelting, Refining & Mining Co.*, 339 U. S. 186, 198-199.

Upon remand, the Trustees prepared a new plan which, in petitioner's view, goes considerably beyond the require-

[8] The court below was unanimous in determining that the reorganization court did not have jurisdiction to determine the taxable consequences of the sale contemplated by the rejected plan (pp. 12b, 23b *infra*); that issue, as to which one of the Trustees unsuccessfully petitioned for certiorari (355 U. S. 838, October Term 1957, No. 274), is no longer present in the case as the new plan provides for an internal reorganization rather than a sale.

ments of the majority ruling as to post-petition interest. Among the objectionable features are the following:[9]

1. The Kentucky public creditors are allowed less than one-third of their total claims for principal and interest. They will receive in cash an aggregate of $2,466,316; they will receive none of the interest which has accrued on their claims since 1930, leaving more than $5,000,000 of their total claims completely unpaid.

2. The American public creditors, although also unsecured as to Inland's assets and holding security having a value less than the principal amount ($1,905,100) of their claims, will receive post-petition interest to the date of payment, or an aggregate cash distribution in excess of $4,800,000.

3. Columbia, the adjudicated wrongdoer, will receive all of the residual assets in the form of the entire equity of the American System. This equity is valued by the S.E.C. at more than $4,000,000 as of December 31, 1957

[9] The aggregate claims, including unpaid pre-petition and post-petition interest, of the respective classes of creditors participating in the Plan were as follows at December 31, 1958:

Claimant	Principal	Unpaid Interest	Total Claims
American Public Creditors	$1,905,100	$2,933,854	$4,838,954
Kentucky Public Creditors	2,778,600	4,759,971	7,538,571
Columbia's Inland Claims	2,143,468	3,785,747	5,929,215

Columbia's claims against Inland are of three types in the following amounts:

Claim	Principal	Unpaid Interest	Total Claims
Inland Bonds	$1,571,055	$2,687,302	$4,258,357
Inland Debentures	320,100	636,732	956,832
General Claim for advances	252,313	461,713	714,026
	$2,143,468	$3,785,747	$5,929,215

(SEC Rep. 20) and at more than $3,000,000 by the Plan. Since Columbia's claim for principal on its Inland Bonds and Debentures is only $1,891,155, and the principal on a doubtful claim for advances is $252,313, Columbia will thus receive substantial post-petition interest on these subordinated claims although such interest is denied to the prior claims of the Kentucky public creditors.

4. On the theory that only Columbia is "affected" by this Plan, no copies of the Plan or the adverse report of the S.E.C. were sent to the numerous and widespread public holders of securities in the American System (A. 37a, 196a, 207a-208a). The Plan was sent only to Columbia for its acceptance (A. 197a, 204a-205a). No voting by public creditors was permitted.

The S.E.C. recommended that the Plan be disapproved (SEC Rep. i, ii). It found that the Trustee's valuation was too low (*Id.* 18-30) and that the Plan was unfair in awarding post-bankruptcy interest to Columbia before such interest is paid to Kentucky public creditors (*Id.* 31-36). It also pointed out that in any event the Kentucky public creditors were entitled to the interest which accrued during the abortive equity receiverships as this antedated the date when Bankruptcy Act proceedings were instituted and constituted pre-bankruptcy rather than post-bankruptcy interest (*Ibid.*).

Overruling the S.E.C. and representatives of public creditors, the District Court approved and subsequently confirmed the Plan (A. 191a-211a). Appeals were taken on behalf of Kentucky public creditors. On motions to dismiss, based on the contention that the original majority opinion of the court below (pp. 7b-27b *infra*), resulting in a non-final judgment, was determinative of the issues, the final order of the District Court was affirmed and the appeals dismissed (pp. 28b-30b *infra*).

Reasons for Allowance of Writ

Interest is a significant component of the claims of public investors—sometimes exceeding principal—and is a matter of recurring practical importance in the administration of reorganization proceedings. In denying post-petition interest to a public class of prior creditors in order to benefit a creditor of lower rank, the court below introduced into this field a far-reaching determination in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in *In re Deep Rock Oil Corp.*, 113 F. 2d 266. The decision vitiates salient aspects of the Court's landmark decisions in *Case v. Los Angeles Lumber Products Co.*, 308 U. S. 106, and *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, upholding the absolute priority rule in reorganizations conducted under the Bankruptcy Act, and in *Taylor v. Standard Gas and Electric Company*, 306 U. S. 307, enunciating the equitable doctrine of subordination. This may be attributable to the fact that, although railroad and corporate reorganizations have now been administered under federal statutes for more than 25 years, this Court has not heretofore taken occasion to furnish full and explicit guidance as to the extent to which the post-petition interest rules developed in the completely different context of straight bankruptcy and liquidation procedures are to be followed in reorganizations. The Court's last pronouncement on post-bankruptcy interest, handed down ten years ago in *City of New York v. Saper*, 336 U. S. 328,[10] implemented the Congressional purpose to restrict the inroads which taxing authorities were making into the limited assets available to trade and merchandise creditors

[10] In the related cases of *United States v. Edens*, *United States v. General Engineering & Mfg. Co.* and *United States v. Bloom*, 342 U. S. 912, the Court affirmed without opinion on the authority of *Saper*. The petition for certiorari in *Commonwealth of Massachusetts v. Thompson*, 190 F. 2d 10 (1st Cir.), then pending, was denied. 342 U. S. 918.

in liquidation proceedings. The *Saper* opinion, however, is being read by some lower federal courts, including the courts below, as inevitably precluding the allowance of post-petition interest to public security holders in reorganization proceedings in most, if not all, circumstances, even those which under earlier decisions of this Court appeared to call for such interest. This has come as a great shock to the financial community in which the main, if not the sole, purpose of investing in corporate bonds and debentures is to earn interest. The present case presents the opportunity for a meaningful review and clarification of the treatment and protection to which the interest claims of the investing public are entitled in reorganizations under the Bankruptcy Act.

The Conflict Between Circuits

1. The conflicting decision in *In re Deep Rock Oil Corp.*, 113 F. 2d 266 (10th Cir.) cert. den. 311 U. S. 699, arose as a sequel to this Court's decision in *Taylor* v. *Standard Gas and Electric Company*, 306 U. S. 307, directing the subordination of the debt claims of *Deep Rock's* parent to the claims of the public holders of *Deep Rock's* unsecured notes and preferred stock. This Court had explicitly assumed that the claims of the public noteholders, including post-petition interest on the unsecured claims, would be satisfied in full before there was any participation by the parent on its subordinated claims (306 U. S. at 314-5). The plan subsequently prepared to carry out the subordination ordered by this Court allowed full post-petition interest on the unsecured notes held by the public. The Court of Appeals for the Tenth Circuit, approving the plan, expressly rejected the parent's contention that interest after the petition was not allowable and that the public claims had to be restricted to principal. 113 F. 2d at 269. As a result, the parent was excluded from participation in the reorganization.

The majority below has disallowed post-petition interest to public claimants under identical circumstances. It recognizes the conflict with *Deep Rock* but suggests that this Court's subsequent decision in *City of New York* v. *Saper*, 336 U. S. 328 rendered *Deep Rock* inapposite (p. 23b *infra*). This is a rather surprising conclusion as the question examined in *Saper* was whether Congress in amending the Bankruptcy Act had intended to alter the former practice of allowing interest on tax claims to the date of payment. The Court's affirmative answer to that limited question is hardly dispositive of the subordination and absolute priority issues presented by *Deep Rock* and by this case. In *Saper*, no changes other than those affecting taxes were claimed or considered.

The wider scope attributed to *Saper* apparently stems from the circumstance that tax claims are given priority in straight bankruptcy and that, in passing, the Court's opinion characterized the Congressional purpose as one to assimilate taxes to other debts. 336 U. S. at 337. This is read as a new mandate by this Court to deny post-petition interest to all unsecured priority claimants, whether in liquidation or in reorganization, even if it does violence to the "fair and equitable" standard which is fundamental to corporate reorganizations or to the objectives of subordinating a parent guilty of breaching fiduciary obligations to public investors. The decision below thus has a sweeping impact upon traditional reorganization concepts. It has received extensive critical comment in law reviews and has focused renewed attention on the question whether the post-bankruptcy interest rules prevailing in straight bankruptcy—to which *Saper* referred in relation to tax claims—can fairly be applied to the needs of corporate reorganizations. See Note, *Post-Bankruptcy Interest in Chapter X Reorganizations*, 67 Yale Law Journal 1131 (May 1958); Note, *Allowance of Post Petition Interest During Reor-*

ganization Proceedings under Chapter X of the Bankruptcy Act, 33 New York Univ. L. Rev. 864 (June 1958).[11]

Automatic Application of Straight Bankruptcy Interest Rules Is Detrimental to Public Investors in Reorganizations.

2. The general rule in straight bankruptcy—which it has been said our legislature copied from the English bankruptcy practice (Holmes, *J.* in *Sexton* v. *Dreyfus*, 219 U. S. 339)—is that interest is suspended and not computed on the unsecured claims against an insolvent once the bankruptcy petition has been filed. "* * * Accrual of simple interest on unsecured claims in bankruptcy was prohibited in order that the administrative inconvenience of continuous recomputation of interest causing recomputation of claims could be avoided. * * *" *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156, 164. "* * * Moreover, different creditors whose claims bore diverse interest rates or were paid by the bankruptcy court on different dates would suffer neither gain nor loss caused solely by delay". *Ibid.* The rule did not appear unreasonable because the assets in the hands of the bankruptcy court for the purpose of liquidation constitutes "a dead fund" [Cooke, *Bankrupt Laws* (4th Ed. 1799) 181] and selection of the date of the bankruptcy petition for the computation of interest "simply fixes the moment when the affairs of the bankrupt are supposed to be wound up". *Sexton* v. *Dreyfus*, 219 U. S. at 344. It was consistent with the basic bankruptcy aim of achieving a pro rata distribution among unsecured creditors.

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[11] One of the attorneys for this petitioner is a part-time Lecturer on Corporate Reorganizations in the Graduate Division of the New York University School of Law, an affiliation to which some of the opposing counsel made reference in their briefs to the court below.

Prior to *Saper* it was the general understanding that the bankruptcy rule suspending post-petition interest—also followed in the liquidation atmosphere which permeated equity receiverships—had not been adopted in the enactment of statutory procedures for corporate reorganizations. This was the view of a leading text [see 6 COLLIER ON BANKRUPTCY (14th Ed.) 2815-17] and of the Securities and Exchange Commission, the governmental agency charged with responsibility in Chapter X proceedings. See *In the Matter of Minnesota and Ontario Paper Company*, S.E.C. CORPORATE REORGANIZATION RELEASE No. 33 (1940) supplementing Report at 7 S.E.C. 456, A3 CORP. REORG. 361 (1940), A4 CORP. REORG. 15 (1940); see also Note, *Allowance of Interest During Reorganization Proceedings*, 50 Yale Law Journal 144 (1940).

The understanding was supported by strong reasoning. In corporate reorganizations, claims are not confined to those provable under Section 63 of the Bankruptcy Act (11 U. S. C. § 103), which embodies the Congressional expression of the rule for straight bankruptcy. Section 106(1), 11 U. S. C. § 506(1). In general, only the consistent and non-conflicting provisions governing straight bankruptcy are to be followed. Section 102, 11 U. S. C. § 502. The assets administered in corporate reorganizations are not "a dead fund"; the business is operated and the earnings are normally actively invested and reinvested. The affairs of the debtor are not wound up at the moment the petition is filed but are continued as a means of preserving going concern values for all interested parties. The purpose is to avoid "* * * a winding up, a sale of assets, and a distribution of the proceeds. * * *" *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U. S. 433, 438. In corporate reorganizations the effective date of the plan, rather than the much earlier filing of the petition, is the key date for determining the respective rights of the various classes of creditors and stockholders. Thus, values are determined not as of the

date of filing but when plans are under consideration; full effect is given to improvements in the interim. The recomputation of claims is not a troublesome problem since the declaration and payment of successive cash dividends, which are contemplated in straight bankruptcy (Section 65, 11 U. S. C. § 105), are not customary incidents of reorganization. The needs of trade and merchandise creditors in straight bankruptcy—who normally do not contract with specific reference to interest and to whom interest, if awarded, is a matter of damages for detention of the debt—are entirely different from those of public bondholders whose only reason for investing in bonds—usually issued at around par—is to earn interest. Public investors concerned with reorganizations bargain for, and depend upon, interest commitments of specific rates differing from class to class.

In consequence, interest rules which serve administrative convenience and do not appear unreasonable in straight bankruptcy can become unjust and prejudicial when automatically carried over to reorganization cases. And the deprivation of interest during reorganizations is an acute problem since, unlike straight bankruptcy, they hold no promise of quick dividends from rapid liquidations but require considerable time for completion. During administrations of extensive duration, which are customary in reorganizations, senior creditors would be at the mercy of junior interests and would bear grave risks without compensation if interest were universally denied. In the present case, for example, no interest has been paid to public creditors for 28 years; in the meantime, the assets formerly thought to be insufficient to satisfy senior creditors and to leave no possibility of participation by the subordinated parent have been so successfully operated and have so increased in value as to be sufficient to satisfy all claims for principal and leave a sizeable surplus as well. Denial of post-petition interest in such circumstances rewards the wrongdoer; the values which became

available because of the withholding of interest from priority creditors are allocated to the very claimant who was ordered to be subordinated because it deliberately caused the bankruptcy and injured the debtors and their public security holders.

Even in straight bankruptcy, the general rule has never been permitted to outweigh equitable considerations. Thus, if a surplus is left after the payment of principal, it is awarded to creditors in payment of post-bankruptcy interest and does not revert to the bankrupt [*Johnson* v. *Norris*, 190 Fed. 459 (5th Cir.), cited in *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 267]; if a creditor's security produces interest or dividends during the proceedings, it is applied on account of post-bankruptcy interest rather than in reduction of principal [*Sexton* v. *Dreyfus*, 219 U. S. 339, 346]; and if sale of the security brings proceeds in excess of principal, they go to the secured creditor as post-bankruptcy interest rather than to other creditors [*Coder* v. *Arts*, 213 U. S. 223]. It is equally mandatory in reorganization cases to give heed to the equities rather than to assume, as does the majority below, that equitable doctrines must yield to some strait-jacket policy frowning on post-petition interest.

The *Saper* Decision Has Produced Doubts as to the Protection of Public Investors Intended by this Court's Absolute Priority and Subordination Decisions

3. In giving content to the fair and equitable standard and the absolute priority rule which it embraces, this Court's pre-*Saper* decisions emphasized the respect to be accorded to post-petition interest in statutory reorganizations. In *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527, the Court said of a plan omitting accrued interest on bond claims: "* * * This interest is entitled to the same priority as the principal. * * *" This was

followed by the rejection in *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523, 546, of the argument "that the effective date of a plan promulgated under § 77 [the railroad reorganization statute] must be the date of the filing of the petition, *the theory being that § 77 does not permit the accrual of interest after that date*" (emphasis supplied). The interest ruling in *Consolidated Rock Products* was reiterated and the similarity in the definition of "claims" in the corporate reorganization and the railroad reorganization statute was relied upon to demonstrate that there was no bar to post-petition interest. See also *R.F.C.* v. *Denver & Rio Grande Western R. Co.*, 328 U. S. 495, 521.

In the *Milwaukee* opinion, which dealt primarily with the duties imposed by the statute upon the Interstate Commerce Commission ("I. C. C.") in its adjudications of the fairness of plans proposed for railroad reorganizations, the Court also sustained an I. C. C. ruling that the unsecured deficiency claim of bondholders and the claims of general unsecured creditors were on a parity and that interest would not be paid to the bondholders if the free assets were insufficient to pay interest also to general creditors. 318 U. S. at 573. The opinion here cited *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, a case arising in a bank liquidation in which the Court had ruled that "• • • *the obligation to pay interest is not destroyed by the insolvency* • • •" and that a secured creditor may enforce his lien up to the value of his security until his claim for interest, as well as principal, is satisfied (at 413; emphasis supplied).

Vanston Bondholders Protective Committee v. *Green*, 329 U. S. 156, which arose in these proceedings, was concerned with the question whether it was appropriate to enforce a covenant to pay interest on unpaid interest; no objection was made or considered concerning the payment of simple interest to bondholders accruing *after* the in-

stitution of the proceedings. The Court divided on the issue whether it was necessary to find the applicable state law and determine the validity of such a covenant under that law. The majority held that even if valid under state law interest on interest would not be allowed by the federal reorganization courts in an insolvency situation because as between creditors it was in the nature of a penalty and therefore inequitable. Prior interest decisions in bankruptcy, receivership and reorganizations were reviewed and the conclusion reached that "a balance of equities" had been "the touchstone of each decision". 329 U. S. at 165.

These pre-*Saper* adjudications, read together with *Taylor* v. *Standard Gas & Electric Company*, 306 U. S. 307, and its sequel, *In re Deep Rock Oil Corp.*, 113 F. 2d 266 (10th Cir.), added up to this: In reorganization proceedings, there was no statutory bar to the accrual of interest after the filing of the petition; interest was entitled to the same absolute priority as principal; claimants in the same class would be treated alike in the payment or non-payment of post-petition interest; as between classes of competing creditors the allowance of interest on unpaid interest was inequitable; and public unsecured creditors granted priority over a parent by reason of the latter's subordination would receive post-petition interest before the parent could share in any residue. Neither *Saper*, nor its subsequent extension without opinion to tax claimants in corporate reorganizations (*United* v. *Edens*, 342 U. S. 912), gives any intimation that the Court intended to impair any of the principles previously established. Yet, in view of the interpretation placed upon them in the court below and in other courts, the unintended, overwhelming effect of *Saper* and *Edens* on the general question of post-petition interest and on the application of the absolute priority doctrine will not be corrected until this Court considers and defines their proper boundaries.

Respondents are expected to argue that the differences between straight bankruptcy and corporate reorganizations were considered in *Edens* and that this Court's decision is a holding that there are no differences and that priorities among unsecured creditors are not recognized for purposes of post-petition interest. There are two independent questions: one relates to the specific Congressional intention as it affects tax claims and whether this intention differs as between straight bankruptcy and other procedures; the other relates to the Congressional intent as to interest in general in framing corporate reorganization procedures with a view to safeguarding public investors. The absence of an opinion in *Edens* and the citation solely of *Saper* justifies the assumption that the first was alone determinative. If *Edens* impinged on broader considerations as well, the problem calls for re-examination at the instance of public security holders unencumbered by the complexity of tax burdens on insolvent estates.

Confusion in Lower Courts Since *Saper*

4. In the ten years since *Saper* the lower federal courts have struggled with a steady stream of post-petition interest cases, tax and non-tax. As in the court below, *Saper* has been regarded by some of them as authority for deviating from the rule of absolute priority. Despite this Court's clear refusal in the *Milwaukee* case (318 U. S. 523, 546) to accept the theory that the reorganization statutes do not permit the accrual of interest after the filing of the petition (*supra* p. 16), it is now said on the basis of *Saper* that "• • • Under the Boyd case existing priorities must be recognized up to the bar date of initiation of the proceedings; but thereafter they stand as then established and are fully discharged upon consummation of the final plan of reorganization. • • •" *State of New York* v. *Feinberg*, 204 F. 2d 502, 503 (2nd Cir.). Although *Saper* itself pointed out that even in straight bankruptcy there were well-de-

fined exceptions to the general rule against post-bankruptcy interest (336 U. S. at 330 n. 7), doubt has been thrown on their availability. "* * * Since the Supreme Court has not yet settled the extent and nature of these suggested exceptions, it may be premature to base an extended argument upon their existence; in pursuance of an overriding policy the Court may ultimately think it not desirable to allow any at all. * * *" *Sword Line* v. *Industrial Commissioner of State of New York*, 212 F. 2d 865, 869 (2nd Cir.), in which Judge Jerome Frank filed a strong dissent. See also *National Foundry Co.* v. *Director of Internal Revenue*, 229 F. 2d 149 (2nd Cir.); but *cf. Marcalus Mfg. Co.* v. *United States*, — Ct. Cls. — (Jan. 14, 1959); *In re F.P. Newport Corp.*, 123 F. Supp. 95 (S. D. Cal.), appeal dismissed 216 F. 2d 344 (9th Cir.). As a result, Judge Learned Hand, who prior to *Saper* spoke for the Second Circuit in requiring that bondholders receive post-petition interest even beyond the effective date of the plan [*Eddy* v. *Prudence Bonds Corp.*, 165 F. 2d 157, 160 (2nd Cir.)], now declares that in the face of *Sword Line and National Foundry, supra*, "* * * there cannot be any doubt that in this circuit City of New York v. Saper * * * is to be regarded as more than a decision as to the marshalling of the assets of a corporation in 'reorganization' or in an 'arrangement'; and as denying the survival of rights of any sort to post-bankruptcy interest." *Columbia Aircraft Company* v. *United States*, 163 F. Supp. 932, 934 (S. D. N. Y.)

The anti-interest climate in which *Saper* seems to flourish has induced some of the courts to rely upon the "balance of equities" stressed in *Vanston* (329 U. S. 156, 165) to deny post-petition interest in the very situations in which equitable considerations were formerly deemed to demand allowance. See *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 411-13. Thus, in *Beecher* v. *Leavenworth State Bank*, 192 F. 2d 10, 14 (9th Cir.), the court concluded that *Vanston* had necessarily overruled its previous

determinations allowing post-bankruptcy interest to a secured creditor when the proceeds of his security were ample for that purpose. More recently—after a lapse of six years—the same court has again reversed itself. See *Palo Alto Mutual Savings & Loan Ass'n.* v. *Williams*, 245 F. 2d 77 (9th Cir.); *Jefferson Standard Life Ins. Co.* v. *United States*, 247 F. 2d 777, 780 (9th Cir.). But, also relying on *Vanston*, another court has recently disallowed post-bankruptcy interest to an amply secured creditor. See *In re Magnus Harmonica Corp.*, —F. 2d— (3rd Cir. Jan. 8, 1959).

Conflicting views as to *Vanston's* meaning in the wake of *Saper* also emerge from the opinions below. The dissenting judge, honoring *Vanston*, points out that under "the complete power of the court to subordinate claims or to adjudicate equities * * *" (*Sampsell* v. *Imperial Paper & Color Corp.*, 313 U. S. 215, 219) the equities unquestionably favor post-petition interest to wronged public creditors in priority to the subordinated fiduciary (pp. 16b-17b *infra*). The majority, however, prefers to view *Vanston* as a narrow holding restricted to interest on interest; in lieu of balancing the equities it succumbs to the weight of an inflexible standard supposedly banning interest after the institution of proceedings (pp. 22b-23b *infra*).

Is there an "overriding policy" to deny post-petition interest at all costs? Are exceptions based on equitable considerations not "desirable"? Is there no "survival of rights of any sort to post-bankruptcy interest"? Is there a policy so powerful that recognition of interest withheld for 28 years from public creditors who are in judicial proceedings because of the unlawful design of a faithless parent must be deemed to "enrich" the victims of its wrongs at the expense of the wrongdoer (p. 23b *infra*)? These large and important public questions, to which lower courts are furnishing answers in conflict with applicable decisions of this Court, should be resolved.

Although Assets Are More Than Sufficient to Pay Principal to All Ranks of Creditors, the Surplus Is Denied to Public Priority Creditors and Awarded Exclusively to Subordinated Parent as Post-Petition Interest

5. The original opinion of the majority below, remanding the case for the formulation of a new plan, was specific only on the disallowance of post-bankruptcy interest to Kentucky public creditors in priority to Columbia and invited speculation as to the exact treatment they would receive in relation to other classes of creditors. The new plan, which the courts below have now sanctioned as a correct translation of the original ruling, furnishes concrete additional evidence of unfairness to the public holders of the Kentucky Bonds and Debentures. Its features are as follows:

a. The Kentucky public creditors receive principal; they are denied all interest which accrued since 1930.

b. Columbia, though subordinated, receives not only the principal of its claims against Inland but also post-bankruptcy interest.

c. The interest denied to the Kentucky public creditors is not solely that which starts with the institution of the proceedings under the Bankruptcy Act in 1935 but includes the pre-bankruptcy interest which accrued during the abortive equity receivership proceedings.

d. The American public creditors, whose security consists primarily of the worthless stock of insolvent Inland and are thus in the same position as unsecured public creditors as to post-petition interest, receive principal and full post-bankruptcy interest.

These unreasonable consequences flow from an interpretation that payment of principal to the Kentucky public creditors constitutes "payment in full" and excludes them from any further participation even though the estate

turns out to have more than enough assets to satisfy the principal of all other claims of equal and junior rank. This presents an issue with which the Court has not been confronted previously. It has dealt with insolvent bankrupts, as in *Sexton* v. *Dreyfus*, 219 U. S. 339, and *Saper*, and has taken note of the effect of a bankrupt's subsequent solvency, as in *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry. Co.*, 233 U. S. 261; it has not considered the intermediate stage of assets sufficient to pay the principal of all claims but short of the solvency necessary to pay interest to all. A subsidiary question is whether the implication of *Saper* is that the obligation to pay post-petition interest to priority creditors is forever destroyed by a proceeding under the Bankruptcy Act or whether it is merely suspended in some circumstances. See *Ticonic National Bank* v. *Sprague*, 303 U. S. 406, 413; *American Iron & Steel Mfg. Co.* v. *Seaboard Air Line Ry.*, 233 U. S. 261, 266. Surely the surplus left after satisfying the principal of the most junior claim should be distributed in the normal order of priorities. Clearly it should not, as in this case, go to Columbia, the subordinated claimant at the bottom of the ladder.

Previously Columbia argued that *Saper* held that "an allowance for post-bankruptcy interest is not to be awarded on unsecured claims, even though such claims were entitled to a statutory priority, *until principal was paid on all lower ranking claims*". Columbia Brief in Opposition to Petitions for Writs of Certiorari, October Term, 1957, Nos. 325, 336, 342 (emphasis supplied). Now Columbia urges that the Plan's provisions awarding it post-bankruptcy interest and denying such interest to prior public creditors are justified because its holdings of Inland Bonds and Debentures were originally secured by mortgage liens on the Inland assets. But the very purpose of the subordination was to deny to Columbia its contractual rights as a bondholder of first rank and to relegate it to the most inferior creditor position, below public creditors of all grades. It is incongru-

ous to envision Columbia as junior to unsecured public creditors and still possessed of the full rights of a superior lien creditor. Yet this is exactly what has been done in the name of an imagined rule limiting the participation of priority creditors to principal irrespective of the debtor's financial situation. In reality, the subordination for which public creditors successfully fought has been wiped out and Columbia has been restored to its former role of superiority and domination. The final irony is that Columbia is the only one permitted to vote on the Plan, and the public investors are both disenfranchised and denied the documents and materials which the statute takes pains to provide for their benefit (A.37a, A.196a-207-208a). Sections 175, 179; 11 U. S. C. §§ 575, 579.

When the case was here previously, the Kentucky public creditors admitted that the lower courts had merely remanded the case and that their judgments were thus non-final. But whatever doubts may then have existed as to the eventual fate of these creditors in their battle with Columbia have now been removed. What was formerly an announcement of an objectionable principle, subject to unpredictable variations in actual application, has been imbedded firmly in a plan in its last stage. Moreover, as shown above, the principle has been carried out in a fashion which raises new questions of wide significance in this field. On this occasion, therefore, the case is both ripe for review and worthy of this Court's full consideration. See *Societe Internationale, Etc., v. Rogers*, 357 U. S. 197, in which the Court granted certiorari (355 U. S. 812) from a final order after denying certiorari (350 U. S. 937) from an earlier order presenting the same question.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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March, 1959.

APPENDIX A

Statutory Provisions

The following provisions of the Bankruptcy Act (52 Stat. 840, 11 U. S. C. § 1 *et seq.*) are pertinent to the questions presented by this petition.

Section 1 (11 U. S. C. § 1). The words and phrases used in this Act and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

* * *

(13) "Date of bankruptcy," "time of bankruptcy," "commencement of proceedings," or "bankruptcy," with reference to time, shall mean the date when the petition was filed;

* * *

(24) "Petition" shall mean a document filed in a court of bankruptcy or with a clerk thereof initiating a proceeding under this Act;

* * *

(28) "Secured creditor" shall include a creditor who has security for his debt upon the property of the bankrupt of a nature to be assignable under this Act or who owns such a debt for which some indorser, surety, or other person secondarily liable for the bankrupt has such security upon the bankrupt's assets;

Section 63 (11 U. S. C. § 103). a. Debts of the bankrupt may be proved and allowed against his estate which are founded upon (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition by or against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; * * * (5) provable debts reduced to judgments after filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of

the petition and up to the time of the entry of such judgments; • • •.

Section 102 (11 U. S. C. § 502). The provisions of chapters I to VII, inclusive, of this Act shall, insofar as they are not inconsistent or in conflict with the provisions of this chapter, apply in proceedings under this chapter: *Provided, however,* That section 23, subdivisions h and n of section 57, section 64, and subdivision f of section 70, shall not apply in such proceedings unless an order shall be entered directing that bankruptcy be proceeded with pursuant to the provisions of chapters I to VII, inclusive. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors," and "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this chapter. For the purposes of such application the date of the filing of the petition in bankruptcy shall be taken to be the date of the filing of an original petition under section 128 of this Act, and the date of adjudication shall be taken to be the date of approval of a petition filed under section 127 or 128 of this Act except where an adjudication had previously been entered.

Section 106 (11 U. S. C. § 506). For the purposes of this chapter, unless inconsistent with the context—

(1) "claims" shall include all claims of whatever character against a debtor or its property, except stock, whether or not such claims are provable under section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent;

• • •

(6) "debts" shall include all claims;

• • •

(9) "petition" shall mean a petition filed under this chapter by a debtor, creditors, or indenture trustee proposing that a plan of reorganization be effected;

• • •

Appendix A

Section 107 (11 U. S. C. § 507). Creditors or stockholders or any class thereof shall be deemed to be "affected" by a plan only if their or its interest shall be materially and adversely affected thereby. In the event of controversy, the court shall after hearing upon notice summarily determine whether any creditor or stockholder or class is so affected.

Section 172 (11 U. S. C. § 572). After the hearing, as provided in section 169 or section 170 of this Act, and before the approval of any plan, as provided in Section 174 of this Act, the judge may, if the scheduled indebtedness of the debtor does not exceed $3,000,000, and shall, if such indebtedness exceeds $3,000,000, submit to the Securities and Exchange Commission for examination and report the plan or plans which the judge regards as worthy of consideration. Such report shall be advisory only.

Section 173 (11 U. S. C. § 573). The judge shall not enter an order approving a plan submitted to the Securities and Exchange Commission until after the Securities and Exchange Commission has filed its report thereon or has notified the judge that it will not file a report, or until the expiration of such reasonable time for the filing of such report as the judge has fixed, whichever first occurs.

Section 174 (11 U. S. C. § 574). After the hearing, as provided in section 169 or section 170 of this Act, and, if a plan has been submitted to the Securities and Exchange Commission, as provided in section 172 of this Act, then after the filing of the report or notice that it will not be filed, or after the expiration of the time for its filing, whichever first occurs, the judge shall enter an order approving the plan or plans which in his opinion comply with the provisions of section 216 of this Act, and which are fair and equitable, and feasible, and shall fix a time within which the creditors and stockholders affected thereby may accept the same.

Appendix A

Section 175 (11 U. S. C. § 575). Upon the approval of a plan by the judge, the trustee or the debtor in possession shall transmit, by mail or otherwise, to all creditors and stockholders who are affected by any such plan—

(1) the plan or plans so approved, together with a summary thereof approved by the judge;

(2) the opinion of the judge, if any, approving the plan, or plans, or a summary thereof approved by the judge;

(3) the report, if any, filed in the proceeding by the Securities and Exchange Commission, as provided in section 172 of this Act, or a summary thereof prepared by the Securities and Exchange Commission; and

(4) Such other matters as the judge may deem necessary or desirable for the information of creditors and stockholders.

Section 179 (11 U. S. C. § 579). After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are disqualified pursuant to section 203 of this Act, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 216 of this Act, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation.

Section 203 (11 U. S. C. § 603). If the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith, in the light of or irrespective of the time of acquisition thereof, the judge may, after hearing upon notice, direct that such claim or stock be disqualified for the purpose of determining the requisite majority for the acceptance of a plan.

Section 216 (11 U. S. C. § 616). A plan of reorganization under this chapter—

* * *

(5) shall specify what claims, if any, are to be paid in cash in full;

(6) shall specify the creditors or stockholders or any class of them not to be affected by the plan and the provisions, if any, with respect to them;

(7) shall provide for any class of creditors which is affected by and does not accept the plan by the two-thirds majority in amount required under this chapter, adequate protection for the realization by them of the value of their claims against the property dealt with by the plan and affected by such claims, either as provided in the plan or in the order confirming the plan, (a) by the transfer or sale, or by the retention by the debtor, of such property subject to such claims; or (b) by a sale of such property free of such claims, at not less than a fair upset price, and the transfer of such claims to the proceeds of such sale; or (c) by appraisal and payment in cash of the value of such claims; or (d) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;

(8) shall provide for any class of stockholders which is affected by the plan and does not accept the plan by the majority of the stock required under this chapter, adequate protection for the realization by them of the value of their

equity, if any, in the property of the debtor dealt with by the plan, either as provided in the plan or in the order confirming the plan; (a) by the sale of such property at not less than a fair upset price; or (b) by appraisal and payment in cash of the value of their stock; or (c) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection; *Provided, however,* That such protection shall not be required if the judge shall determine that the debtor is insolvent;

* * *

Section 221 (11 U. S. C. § 621). The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

APPENDIX B

Opinions and Orders of Court of Appeals

Opinion Dated February 14, 1957

In re INLAND GAS CORPORATION, Debtor.

In re KENTUCKY FUEL GAS CORPORATION, Debtor.

In re AMERICAN FUEL & POWER COMPANY et al., Debtor.

Nos. 12861-12867.

Before SIMONS, Chief Judge, and MILLER and MARTIN, Circuit Judges.

SIMONS, Chief Judge.

After more than twenty-six years of Receiver and Trustee operation of the Debtors' properties, of litigation delaying reorganization under Chapter X of the Bankruptcy Act, 11 U. S. C. A. § 501 et seq., of consideration of numerous Plans for reorganization or liquidation and after five submissions and determinations in this Court of numerous issues, the tangled skein is again before us in seven appeals from an order of the District Court by the Trustees, the objecting creditors' Committees, and the proponent of still another Plan of reorganization. The order variously supported and assailed disapproves the latest submitted Plan and directs the Trustees to prepare and file a new Plan of reorganization so designed as to eliminate specific provisions of the submitted Plan and avoid the hazard of a substantial tax liability asserted by the Commissioner of Internal Revenue.

The past history of the debtor corporations is disclosed in the opinions of this Court in Columbia Gas & Electric Corporation v. United States, 6 Cir., 151 F. 2d 461, modification denied, 6 Cir., 153 F. 2d 101, certiorari denied 329 U. S. 737, 67 S. Ct. 48, 91 L. Ed. 636; In re Inland Gas Cor-

poration, 6 Cir., 187 F. 2d 813; In re Inland Gas Corporation, 6 Cir., 208 F. 2d 13; In re Inland Gas Corporation, 6 Cir., 211 F. 2d 381, certiorari denied Kern v. Williamson, 348 U. S. 840, 75 S. Ct. 45, 99 L. Ed. 662; In re Inland Gas Corporation, 6 Cir., 217 F. 2d 207. Their present problems will, likewise, be herein detailed. Due to the insolvency of the Debtors, solution of their difficulties was first sought on December 2, 1930 by an equity receivership, followed since October 15, 1935 by proceedings under §77B of the Bankruptcy Act and, finally, by corporate reorganization proceedings under Chapter X of the Bankruptcy Act. After much effort to formulate a Plan under the provisions of that Chapter, a Plan entitled "Amended Plan of Reorganization," dated February 12, 1953, was found to be fair, equitable and feasible, by the District Court, in an order entered on that date, but by reason of a challenge thereto, by appeal to this Court and by certiorari to the Supreme Court circumstances had so changed in respect to the dominant Inland Estate that the Plan could no longer be used without modifications. The important new developments consisted of a substantial increase in the value of the Inland Estate since the earlier approval of the Plan and the receipt by the Trustees of an offer to pay $6,750,000.00 cash for the fixed assets of Inland and certain subsidiaries of American by the Texas Gas Transmission Corporation. The Court, thereupon, directed the Trustees to amend the reorganization Plan of 1953 to the extent necessary to embody therein the Texas offer and to make appropriate provision for a public auction of the fixed assets of the corporations with the amount of the offer to constitute a fair upset price. The Amended Plan of reorganization was thereafter so modified. It was found worthy of consideration and referred to the SEC. The upset price was in excess of the adjusted basis for Federal income tax purposes of the assets which were to be sold, so, the appellant, Trustee of Inland, applied to the Commissioner of Internal

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Revenue for a ruling as to whether or not the proposed sale would result in any Federal income tax liability to Inland or its Trustee. It was the Trustee's position that the Texas Plan would fall within reach of § 337 of the Internal Revenue Code of 1954, 26 U. S. C. A. § 337, and that no gain or loss should under its provisions be recognized. A later and better bid was thereafter received from the Tennessee Gas Transmission Company which offered $8,000,000.00 in cash for the same properties which it confirmed by a deposit of $400,000.00. In view of this offer, the Court, on July 14, 1955, directed the Trustees to prepare a new Plan of reorganization, which is the Plan here in controversy. It, like the Texas Plan, provides for the sale of the fixed assets of Inland and the subsidiaries of American, at public auction, to the highest bidder, with the Tennessee offer of $8,000,000.00 as a fair upset price. It provides for the distribution of the net proceeds of the sale and the proceeds of other assets of the Debtor and for the complete dissolution of the debtor corporations. The Texas Plan filed by the trustees, having been found worthy of consideration, was submitted to the SEC, which recommended disapproval. Thereafter the Texas Plan was superseded by the Tennessee Plan, which was submitted to the SEC and, as subsequently amended, was found by the SEC to be fair and equitable and feasible.

The Texas Plan having provided for a complete liquidation for the Debtors, the Commissioner of Internal Revenue, through the Director of Tax Rulings Division, issued a ruling that the proposed sale under the Texas Plan would result in the recognition of gain, for purposes of Federal income taxes. After the substitution of the Tennessee offer for that of Texas, the Trustees applied to the Commissioner for a reconsideration of its ruling but, on December 29, 1955, the Commissioner reaffirmed his original decision. It is estimated that if that decision is correct, the Federal tax involved would be approximately $1,192,000.00. In

objecting to the Plan before it was approved as fair, equitable and feasible, and during the voting on the Plan by the creditors and when confirmation was under consideration, appellant Paul E. Kern relied principally, as grounds for his objections, upon these rulings and as an assumed result of a letter sent by him to all Kentucky creditors, the Plan was not approved by them. Kern was not an original investor in the Kentucky bonds and debentures but began buying Kentucky securities on May 5, 1941 and after the large claims of the Columbia Gas & Electric Corporation were because of its inequitable conduct subordinated to the claims of all other creditors of the Debtors and, because of the successful operations of the Trustee, continued to purchase Kentucky securities throughout the years until he had acquired $303,300.00 face value of first mortgage bonds and a substantial number of Kentucky debentures through 1952, 1953 and 1954 until he owns 34% of the outstanding issue of bonds and some debentures. If the submitted Plan of reorganization is confirmed, it is clear that Kern will reap a very substantial profit upon his purchases, even if the tax claim of the Government is sustained, and a much greater profit if the tax claim is held invalid.

After a hearing, the Court entered its order of March 14, 1956. It considered the petitions of the Trustees of American, Inland and Kentucky Fuel that the Plan last submitted be confirmed, heard counsel for Kern and certain stockholders of American in opposition to confirmation, and counsel for SEC, to the effect that further consideration of the Plan should await a determination of the Federal Income Tax question. Counsel appeared specially for the Attorney General of the United States, the Secretary of the Treasury, the Commissioner of Internal Revenue and the District Director of Internal Revenue for Kentucky and moved to dismiss the petition of the Inland Trustee for want of jurisdiction. The Court was of the opinion that the petition was in effect an application for a

declaratory judgment and that under the provisions of the Federal Declaratory Judgment Act, 28 U. S. C. A. §§ 2201, 2202, it was without jurisdiction to entertain it. Whereupon, it ordered that the petition of the Trustee be dismissed. It also held that the public holders of bonds and debentures of Kentucky Fuel, being unsecured creditors, were not entitled to post-bankruptcy interest on their claims and, that the Plan is erroneous in allowing such interest, and because the Court lacks jurisdiction and cannot pass upon the tax question, the Plan should not be confirmed. The Court also considered the proposed Kern Plan and, being of the opinion that the Plan was not worthy of consideration for the reason that it proposed to encumber the reorganized corporation with a heavy debt, it held the Kern Plan not worthy of consideration.

We are now advised by the Trustees of the Debtors that the Tennessee offer of $8,000,000.00 for the fixed assets of Inland and of American's subsidiaries has been withdrawn, under a reservation contained in its offer, and that the deposit of Tennessee, as evidence of its good faith, has now been released. In order that the record may be complete as of the date of this opinion, we have asked the Trustees to secure signed stipulations to supplement the record in this respect. We assume that this will be done. We also assume that if a new Plan is submitted and approved which will contain either a provision for the sale of the assets of the Debtors or an internal Plan that will not provide for such sale, the offers of both the Texas and the Tennessee Companies will furnish some guidance to the Court as to their value, whether represented by distribution of cash or stock in a new corporation.

It is apparent that the more important issues, here involved, relate to the validity of the Commissioner's ruling on the taxability of proceeds of sale, if sale is made, and the provision in the Plan for post-bankruptcy interest to the holders of Kentucky bonds and debentures. Minor issues will also be dealt with.

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The Tax Question. The Trustees contend, upon advice of counsel, that the Commissioner's ruling is arbitrary and capricious and in disregard of the plain language of § 337 of the Internal Revenue Code of 1954. That Section insofar as pertinent provides that if a corporation adopts a Plan of complete liquidation on or after June 22, 1954 and within the twelve months period beginning on the date of the adoption of such Plan, all of the assets of the corporation are distributed in complete liquidation, less assets retained to meet claims, then no gain or loss shall be recognized to such corporation from the sale or exchange by it of property within such twelve months period. Their contention is that this language is clear and unambiguous, making interpretation unnecessary; that liquidation is consistent with a reorganization proceeding under Chapter X and that the Plan meets every requirement of the Section involved, if it be given its plain meaning. The Commissioner's contention that the word "distributed" means a distribution of assets to stockholders in cancellation and redemption of stock is a rewriting of the statute by inserting in it the words "to stockholders" after the word "distributed," so as to make the phrase read "distributed to stockholders in complete liquidation." This, the Trustees say, he is not empowered to do. Moreover, it would be highly inequitable to recognize gain by an insolvent corporation when all of its assets are distributed to its creditors and nothing to its stockholders. Faced with the assertion of what they consider an illegal tax, they petitioned the Court for instructions as to its illegality, and sought injunctive relief against the officials who would assess the tax and undertake to collect it. Moreover, they argue that the Bankruptcy Court, in a Chapter X proceeding, has exclusive jurisdiction to determine the validity of post-bankruptcy taxes; that such taxes are expenses of administration and have so been recognized. They see no practical objection to the District Court passing upon the tax

question now rather than following a sale of assets; that the objections thereto are highly technical and specious and should bow to the practical necessity of having the tax question put at rest, in order that an advantageous Plan of reorganization may be confirmed and the long drawn out proceedings brought to an end. They stress the opportunity that has been presented for a successful and prompt reorganization by the $8,000,000.00 offer received by Tennessee. They say that, if withdrawn, the creditors will suffer and they will have no recourse against the Commissioner or anyone else. (This argument, of course, loses effectiveness by the withdrawal of the Tennessee offer and the release of its deposit.)

The Government, appearing specially, makes no response to the contention of the Trustees that § 337 must be literally applied and that there is no room for interpretation of its terms. It bases its objections to the relief prayed for in the several petitions of the Trustees upon jurisdictional and procedural grounds. There is, it says, no actual controversy in the constitutional sense. There has been no sale of assets, no assessment of taxes, and no effort to collect taxes. No possible taxable event had occurred at the time of the filing of the petitions, or since, and might never occur. The petitioners seek a declaratory judgment, even if what they ask for is not so denominated. It points out that the Declaratory Judgment Act, § 2201 Tit. 28 U. S. C., is limited to actual controversies and contains an express exception that it shall not apply "with respect to Federal taxes." In addition to the prayer for what in reality is a declaratory judgment, the Trustees also sought injunctive relief against the assertion and enforcement of any tax claim in connection with the possible sale of assets under the Plan but such restraint is barred by § 7421 of the Internal Revenue Code of 1954, 26 U. S. C. A. § 7421, which provides, with certain exceptions, that no suit for the purpose of restraining the assessment or collection of any tax

shall be maintained in any court. The exceptions refer only to instances where proceedings have been instituted before the Tax Court.

[1,2] The rulings of the Commissioner are not lightly to be dismissed as arbitrary or capricious, and are based upon the Income Tax Regulations under the 1954 Code, 26 C. F. R. § 1.337-2(b). The problem with which § 337 was concerned arose out of the decisions in Commissioner v. Court Holding Co., 324 U. S. 331, 65 S. Ct. 707, 89 L. Ed. 981, and United States v. Cumberland Public Service Co., 338 U. S. 451, 70 S. Ct. 280, 94 L. Ed. 251, and the Section was enacted to avoid nice distinctions between whether property was sold by a corporation or in reality by its shareholders. It was thought that technical distinctions were undesirable and § 337 was designed to eliminate them. While the Section speaks in terms of distribution, it is silent as to whom the assets are to be distributed. It may require clarification but that must await the happening of the taxable event. Meanwhile, the hazard of so substantial a tax liability is too great to make the present Plan equitable and feasible. The Congress has provided ample machinery for the settlement of income tax controversies and the provisions in respect to them are exclusive, subject to exceptions by circumstances not herein demonstrated, for the withdrawal of the Tennessee offer destroys the argument that the Security Holders would suffer irreparable injury if the properties of the Debtors were not disposed of by sale. We do not reach the meritorious question raised by the Trustees with respect to the meaning of § 337 because the Court is barred from considering it by the limitation in the Declaratory Judgment Act and the prohibition contained in § 7421. On either, or both, of these grounds, we sustain the District Court in denying the petition of the Trustees for approval of their last submitted Plan of reorganization.

Appendix B

The Question of Post-Bankruptcy Interest. By our previous decisions, claims of Columbia Gas & Electric Corporation were subordinated to the claims of other creditors rather than rejected, In re American Fuel & Power Co., 6 Cir., 151 F. 2d 470, 479. Our specific language was: "Claim of Columbia Gas & Electric Corporation, based upon its ownership of Mortgage Bonds issued by Inland, is not to be rejected but is to be subordinated to the claims of other creditors." In 187 F. 2d 813, 819, we said: "The order will be amended by direction to subordinate the claims of Columbia to the public holders of Kentucky and American Fuel obligations secured by pledges of Inland stock in recognition of their creditors status. Columbia claims against American Fuel and Kentucky Fuel will remain subordinated to the claims of their other creditors." We adhered to those rulings. 217 F. 2d 207. Following them, Columbia no longer took active part in the reorganization proceedings. No specific statement was made in any of the prior determinations respecting interest on the Kentucky bonds and debentures because at the time it was not apparent that the surplus assets of Inland would be sufficient to pay the principal of such obligations. It now appears that, through continued successful operation of the Trustees, such Bonds and Debentures can be paid in full with a surplus remaining after such payment; and Columbia has returned to the case with a challenge to the provisions of the present Plan which require that such surplus be applied to liquidate the interest obligations of the Debtors on such securities. It contends that since its claims were not rejected, it is entitled to payment thereon before payment of post-bankruptcy interest, since the Kentucky Bonds and Debentures were unsecured by pledges of the Inland stock held by Kentucky. With this position the District Court was in agreement.

[3] The general rule in bankruptcy and in equity receiverships has been that interest on the Debtors' obligations ceases to accrue at the beginning of proceedings. This is based upon reasoning that interest is a penalty for delay in payment, and where the power of the debtor to pay his contractual obligations is suspended by law, interest during suspension may not be accrued, if the courts are properly to preserve and protect the estate for the benefit of all interests involved. There are, however, well recognized exceptions to this general rule. (1) If the alleged bankrupt proves solvent, post-bankruptcy interest is paid before any surplus reverts to the Debtor. (2) If securities held by a creditor as collateral produce interest or dividends during bankruptcy such amounts are applied to post-bankruptcy interest. (3) If the value of the security is more than sufficient to pay both principal and interest thereon, payment of post-bankruptcy interest is allowed to the date of payment of the claim secured thereby. There was for a period a difference of opinion as to allowance of interest on tax claims. They were considered in some jurisdictions as claims of higher dignity than general claims. This difference has now been resolved by the City of New York v. Saper, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710, and they are now regarded as debts on a par with other debts of the bankrupt.

[4] Whether interest should be allowed upon claims against the bankrupt Debtors is, we think, no longer to be determined by their relative dignity, in the light of the Saper case. Our decision must be reached by balancing the equities as between Columbia and the Kentucky creditors who have waited so long for the payment of their claims. "It is manifest," said Mr. Justice Black, for the majority, in Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 67 S. Ct. 237, 241, 91 L. Ed. 162, "that the touchstone of each decision on allowance of interest in bankruptcy, receivership and reorganization has been

the balance of equities between creditor and creditor or between creditors and debtor." It is clear to the writer from this observation and the rationalization in Sampsell v. Imperial Paper & Color Corporation, 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293, In re Deep Rock Oil Corporation, 10 Cir., 113 F. 2d 266, certiorari denied, Standard Gas & Electric Co. v. Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, and its predecessor, Taylor v. Standard Gas & Electric Co., 306 U. S. 307, 618, 59 S. Ct. 543, 83 L. Ed. 669, that, as said in Sampsell, 313 U. S. at page 219, 61 S. Ct. at page 907, "The power of the bankruptcy court to subordinate claims or to adjudicate equities arising out of the relationship between the several creditors is complete," and the further observation that "To bring himself outside of that rule an unsecured creditor carries a burden of showing by clear and convincing evidence that its application to his case so as to deny him priority would work an injustice." That such burden is fully borne here and by our earlier decisions amply demonstrated.

We said in 211 F. 2d 381, 384: "It would be not only an anomaly, but would fly in the face of the rationale of all prior adjudications to permit Columbia, directly or indirectly, to receive any portion of Inland's surplus while the secured creditors of Kentucky were still, to large extent, unpaid." This concept pervades all previous adjudications and includes, by necessary inference, the entire debt owing to Kentucky Bond and Debenture Holders up to the time that they are paid, either in cash or by stock in a newly organized corporation, for Kentucky as well as Inland and American was the beneficiary of Columbia's subrogation resulting from its highly inequitable conduct by which all three of these integrated Debtors were placed under the jurisdiction of the Bankruptcy Court. With such result, the SEC agrees.

Of the remaining appeals and the petition of the Allen Committee, little discussion need be added in the present

posture of this proceeding. The SEC complains of the decision of the District Judge to the effect that the Kern Plan for an internal reorganization was not worthy of consideration and, therefore, should not be submitted to the Commission. The Court having directed the Trustees to frame and submit a new Plan of reorganization, which may or may not contain a provision for sale of the properties, or which may or may not submit some form of internal reorganization, there will be time and opportunity to consider such new approach to the problems here involved. We may not speculate at this time in respect to the provisions of the new approach or whether the Court will find it worthy of consideration by the SEC. Until such Plan is submitted, we make no decision upon the grievance of the SEC. The Allen Committee has suggested that there are changed circumstances which warrant the reopening by this Court of its prior decisions holding the public creditors of Kentucky entitled to be treated as creditors of Inland Gas before the claims of Columbia Gas or the stockholders of Inland may be recognized. The holders of Kentucky bonds and debenture asks us to dismiss the petition of the Allen Committee on the ground that it runs counter to our previous determinations, presents no changed circumstances calling for retreat therefrom, and moves its dismissal, as well as that of Spilman, representing Stockholders of American, on the ground that both are frivolous and without merit. Undoubtedly, the petitions, if sustained, would mean a reopening of determinations previously, and repeatedly, made. We decline to do so. The motion to dismiss will be sustained and the petition of the Allen Committee and Edward D. Spilman will be dismissed.

The seven appeals from the order of the Court, entered March 14, 1956, so variously approve and disapprove of that order and respond variously to contentions of appellants and appellees that it would be difficult and confusing to frame a specific mandate in each case to implement our

holdings herein. The writer thinks it sufficient, therefore, to direct the dismissal of the petitions of the Allen Committee and Edward D. Spilman in case No. 12865, and to direct that a single mandate be entered in each of the appeals, amending the order of the District Court in the single respect that it holds post-bankruptcy interest may not be recovered by the holders of Kentucky bonds and debentures and, as so amended, affirming the order, without ruling on the merits of the SEC contention that the Kern Plan be submitted to it for consideration. With this my colleagues do not wholly agree.

[5] Since it now appears from the concurring opinions of my brothers that while they concur in all respects with the above opinion, save only in the view that post-bankruptcy interest shall be allowed on the Kentucky bonds and debentures, it follows that the order of the district judge is not to be amended but that in all respects it must be and it is hereby affirmed.

Wherefore, the petition of the Allen Committee and Edward D. Spilman is hereby dismissed and the order of the District Judge is hereby,

Affirmed.

MILLER, *Circuit Judge.*

I concur with the views and ruling of the foregoing opinion except insofar as it expresses the view that post-bankruptcy interest should be allowed to the public holders of bonds and debentures of Kentucky. In that respect I agree with the ruling of the District Judge who was of the view that the proposed plan of reorganization should not be approved because, in addition to the uncertainties resulting from the undetermined tax question, it erroneously provided for the payment of post-bankruptcy interest.

As stated in the opinion, the general rule in bankruptcy and in equity receiverships is well settled that interest on

the debtor's obligations ceases to accrue at the start of bankruptcy proceedings. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 163, 67 S. Ct. 237, 91 L. Ed. 162; Sexton v. Dreyfus, 219 U. S. 339, 344, 31 S. Ct. 256, 55 L. Ed. 244; City of New York v. Saper, 336 U. S. 328, 330-331, 69 S. Ct. 554, 93 L. Ed. 710. There are two well-recognized exceptions to this general rule. (1) If the alleged "bankrupt" proves solvent, creditors receive post-bankruptcy interest before any surplus reverts to the debtor, and (2) if securities held by a creditor as collateral produce interest or dividends during bankruptcy, such amounts are applied to post-bankruptcy interest on the secured debt. American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., 233 U. S. 261, 267, 34 S. Ct. 502, 58 L. Ed. 949; City of New York v. Saper, supra, 336 U. S. 328, at page 330, 69 S. Ct. 554, at page 555, Note 7. This Court and some other courts have recognized a third exception, namely, where the value of the security is more than sufficient to pay the principle of the debt secured, the excess should be applied to post-bankruptcy interest on the obligation so secured. In re Macomb Trailer Coach, 6 Cir., 200 F. 2d 611, 613, certiorari denied; McInnis v. Weeks, 345 U. S. 958, 73 S. Ct. 930, 97 L. Ed. 1378, with cases cited therein.

Appellants attempt to avoid the effect of the rule disallowing post-bankruptcy interest on unsecured claims by taking the position (1) that the bonds of Kentucky are secured claims, or (2) if they are unsecured claims, the claims of Columbia should be rejected rather than subordinated, which would eliminate any contest between Columbia and the public holders of bonds and debentures of Kentucky. We have rejected these contentions in prior appeals. The Court in the present case is unanimous in its view that those rulings be adhered to. For the purposes of our present case we accordingly must consider Columbia's claim as an existing valid claim, but subordinated in rank to the payment of other creditors.

Such subordination does not in any way change the rule that post-bankruptcy interest is not payable on an unsecured claim as long as other claims which have been allowed remain unsatisfied. Under the ruling in Sampsell v. Imperial Paper & Color Corp., 313 U. S. 215, 61 S. Ct. 904, 85 L. Ed. 1293 and Pepper v. Litton, 308 U. S. 295, 60 S. Ct. 238, 84 L. Ed. 281, the Court had authority to disallow the claim of Columbia. Having declined to do so, Columbia is entitled to stand upon its rights as a creditor, even though a subordinated one. When all other creditors are paid in the manner which the bankruptcy law recognizes as payment in full, the subordination has been carried out and the creditor is entitled, as a creditor, to its rights in the remaining assets. Jamison v. Federal Deposit Insurance Corp., 5 Cir., 149 F. 2d 199, 200. A denial of this right is in substance a rejection or disallowance of the claim, which this Court has heretofore declined to do.

Appellants in effect urge upon us a fourth exception to the general rule, namely, that post-bankruptcy interest should be paid to an unsecured claim of a higher rank before any payment is made to a claim of a lower rank. They contend that it is immaterial whether the difference in rank arises out of the contractual terms of the creditors' claims or because one creditor has been subordinated to other creditors because of the inequitable and unconscionable conduct of the subordinated creditor, as in the present case.

I do not believe the authorities support that contention. On the contrary, such a contention appears to me to be expressly rejected by the Supreme Court in City of New York v. Saper, supra, 336 U. S. 328, 69 S. Ct. 554, 93 L. Ed. 710. The tax claim in that case on which post-bankruptcy interest was denied was of a higher ranking than claims of general creditors. Section 64, sub. a(4), Bankruptcy Act, Sect. 104, sub. a(4), Title 11, U. S. C. A. The Court said 336 U. S. at page 337, 69 S. Ct. at page 559: "The Court

of Appeals concluded that by the 1926 Amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after those amendments to §§ 64, sub. a, and 57, sub. n [11 U. S. C. A. § 93, sub. n]." The same rule has been held applicable in a reorganization proceeding under Chapter X, United States v. Edens, 4 Cir., 189 F. 2d 876, affirmed 342 U. S. 912, 72 S. Ct. 357, 96 L. Ed. 682. See also: United States v. General Engineering & Mfg. Co., 8 Cir., 188 F. 2d 80, affirmed 342 U. S. 912, 72 S. Ct. 358, 96 L. Ed. 682; Pavone Textile Corp. v. Bloom, 302 N. Y. 206, 97 N. E. 2d 755, affirmed sub nom., United States v. Bloom, 342 U. S. 912, 72 S. Ct. 357, 96 L. Ed. 682; Commonwealth of Massachusetts v. Thompson, 1 Cir., 190 F. 2d 10, certiorari denied 342 U. S. 918, 72 S. Ct. 364, 96 L. Ed. 686; Sword Line v. Industrial Commissioner, 2 Cir., 212 F. 2d 865, certiorari denied 348 U. S. 830, 75 S. Ct. 53, 99 L. Ed. 654; National Foundry Co. of New York v. Director of Internal Revenue, 2 Cir., 229 F. 2d 149. The exception was not recognized by this Court in New York Trust Co. v. Detroit, T. & I. Ry., 6 Cir., 251 F. 514. To the same effect is Jamison v. Federal Deposit Insurance Corp., supra, 5 Cir., 149 F. 2d 199; United States v. Paddock, 5 Cir., 187 F. 2d 271, 272; Application of Progress Shoe Co., D. C. E. D. N. Y., 107 F. Supp. 114, 116; Squire v. American Express Co., 131 Ohio St. 239, 260, 2 N. E. 2d 766.

Appellants rely upon Vanston Bondholders Protective Committee v. Green, supra, 329 U. S. 156, 67 S. Ct. 237, 240, 91 L. Ed. 162. Although the Court expressed the view in the opinion in that case that there should be a balancing of equities between creditors, it also restated the general rule that in bankruptcy and in equity receivership, "interest on the debtors' obligations ceases to accrue at the beginning of proceedings." The actual ruling in the case was a disallowance of interest on interest on secured claims.

The Court pointed out, 329 U. S. at page 166, 67 S. Ct. at page 241, that where the failure to pay interest when due is the result of an order of the bankruptcy court, entered for the joint benefit of debtor, creditors and the public, it was not consistent with equitable principles to enrich the mortgage bondholders at the expense of subordinate creditors, even though their mortgage contract called for the payment of interest on interest. We have a similar situation in the present case.

In re Deep Rock Oil Corp., 10 Cir., 113 F. 2d 266, certiorari denied Standard Gas & Electric Co. v. Taylor, 311 U. S. 699, 61 S. Ct. 138, 85 L. Ed. 453, lends some support to appellants' contention. However, the ruling is based largely upon three cases, one of which was American Iron & Steel Mfg. Co. v. Seaboard Air Line Ry., supra, 233 U. S. 261, 34 S. Ct. 502, 58 L. Ed. 949, which involved secured claims rather than unsecured claims, and two cases involving interest on tax claims which were decided contrary to and prior to the ruling in City of New York v. Saper, supra. These cases furnish no real support for the ruling.

I am of the view that the public holders of bonds and debentures of Kentucky are not entitled to the payment of post-bankruptcy interest. I concur in the views of Judge Martin, hereinafter expressed, with respect to the tax phase of the controversy.

MARTIN, *Circuit Judge.*

In my view, the judgment of the district court should be affirmed in entirety. It is elementary that, except in certain situations not applicable here, the courts of the United States have jurisdiction only where granted, both by the Constitution of the United States and by an Act of Congress. It is equally basic that the Congres has power to limit the jurisdiction of the inferior courts and has often done so. The requirement of a minimum jurisdictional amount in certain cases is an example of such Congressional limitation.

Appendix B

The Declaratory Judgments Act, section 2201 of Title 28, U. S. C. provides: "In a case of actual controversy within its jurisdiction, *except with respect to Federal taxes*, any court of the United States * * * upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." [Emphasis added.]

The argument urged is that jurisdiction to adjudicate the tax question raised in the petition dismissed by the district court is not based upon the Declaratory Judgments Act and therefore is not subject to its interdiction "with respect to Federal taxes."

The Trustee insists that he, as Trustee of the debtor corporation, is an officer of the bankruptcy court; and that, in such capacity, he has the right and also the duty to petition the court for advice and instructions concerning disbursement of funds of the debtor's estate to the taxing authorities. His contention is that the bankruptcy court as a court of equity has jurisdiction to adjudicate finally the rights of the parties, even though these rights be based upon future contingencies; and that it is the duty of the court to exercise its jurisdiction in this respect.

The *source* of jurisdiction is not determinative of the issue here. The question for decision is whether or not the Congress had *withdrawn* from United States Courts the jurisdiction to adjudicate tax matters before the occurrence of the taxable event. In my judgment, the Federal Declaratory Judgments Act has withdrawn from the courts of the United States jurisdiction to adjudicate prematurely matters "with respect to Federal taxes."

The Trustee contends that such inhibition of the Federal Declaratory Judgments Act does not apply, for the reason that the jurisdiction of a federal court sitting in bankruptcy to entertain a trustee's petition for instructions is not

founded upon that Act. But the *source* of the jurisdiction is unimportant where jurisdiction has been withdrawn subsequently by the Congress. Appellant's brief invites attention to the fact that the "absence of a federal declaratory judgments statute did not deter the District Court from rendering a decision on a petition for instructions in the case of Scott v. Western Pacific R. R. Co." 9 Cir., 1917, 246 F. 545, 546. Appellant points to the following language in that opinion: "Receivers are officers of the court, and by all authority may properly ask instructions from the court concerning the administration of the property in their hands. [Citing authorities.] That the question presented to them involves payment of taxes does not change the rule." The interdiction of the Federal Declaratory Judgments Act has changed this rule with respect to taxes. Therefore, I do not consider that the authority cited gainsays the conclusion reached here.

Appellant advances several arguments to support the proposition that the Federal Declaratory Judgments Act created a new form of action in the federal courts and was not intended to limit existing remedies. He directs attention to the title of the statute, "Creation of [a] remedy," and quotes the Senate Committee Report in relation to the Act, which states: "The proposed section 274d would simply extend declaratory relief to other cases, provided the parties and the subject matter are within the jurisdiction of the federal courts, in the same way that such relief has been extended in England. * * * *"*

Study of the history of the Act reveals that the words "except with respect to Federal taxes" upon which this issue turns were not a part of the original statute, but were inserted by amendment in 1935. 49 Stat. 1027. Therefore, the quoted Senate Report would have no bearing. Even if this were not true, it is difficult to believe that an act creating new remedies would not modify standing remedies where inconsistent with the new legislation. *A fortiori*, an

express prohibition cannot be nullified simply because a contrary rule is in effect at the time of the new enactment.

Appellant attaches some importance to the fact that he, as Trustee of the debtor corporations, is an officer of the court and that under the surrounding circumstances these corporations are not ordinary taxpayers, inasmuch as they are engaged in a reorganizational liquidation under Chapter X of the Bankruptcy Act. The Congress has announced public policy in this matter in section 960 of Title 28, U. S. C., as follows: "'§ 960. Tax liability. Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation."

From the above language, it is clear that the Trustee of the debtor corporations is on the same footing with any other taxpayer. As a practical matter, there would seem to be no reason why the law should be otherwise. A *solvent* corporation engaged in a reorganization may have an equally large amount of tax liability, contingent upon the outcome of litigation subsequent to the occurrence of a potentially taxable event. There is no reason why an *insolvent* corporation should be in a preferred position. The possible loss of a favorable business transaction is insufficient reason of itself to create the extraordinary circumstances necessary for the injunctive relief sought by appellant. The Internal Revenue Code of 1954, section 7421, states the general rule: "(a) Tax. * * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court" This restraint against injunctive action is not absolute. The Supreme Court has recognized this modification: "* * * in cases where complainant shows that in addition to the illegality of an exaction in the guise of a tax there exist special and extraordinary circumstances sufficient to bring the case within some acknowledged head of equity jurisprudence, a

suit may be maintained to enjoin the collector." Miller v. Standard Nut Margarine Co., 284 U. S. 498, 509, 52 S. Ct. 260, 263, 76 L. Ed. 422.

This court has held that any exception to the universality of the application of section 7421 of the Internal Revenue Code must turn upon "present extraordinary and entirely exceptional circumstances." John M. Hirst & Co. v. Gentsch, 6 Cir., 1943, 133 F. 2d 247, 248. We stated there that the "circumstances that are to be considered extraordinary or exceptional have never, of course, been catalogued." In my judgment, departure from the clear statutory prohibition is not warranted in the present circumstances.

Inasmuch as the United States District Court had no jurisdiction over the subject matter in the tax phase of this proceeding, it is unnecessary to consider whether there was personal jurisdiction over the several taxing authorities and whether the rulings of the Commissioner as to the effect of section 337 of the Internal Revenue Code are correct.

I am in accord with the conclusion of Judge MILLER, for the reasons stated by him, that post-bankruptcy interest should not be allowed to the public holders of the bonds and debentures of Kentucky Fuel Gas Corporation.

The order of the United States District Judge dismissing the Trustee's petition for adjudication of the tax liability for lack of jurisdiction should, in my judgment, be affirmed.

Opinion Dated January 15, 1959

In the Matter of:

INLAND GAS CORPORATION,
KENTUCKY FUEL GAS CORPORATION,
AMERICAN FUEL & POWER COMPANY,

Debtors.

Nos. 13,657-13,663, Incl.

Before SIMONS, MARTIN and MILLER, Circuit Judges.

PER CURIAM. These cases have been heard on motions of the trustee of American Fuel & Power Company [supported by the Columbia Gas Systems, Inc., the Green Committee for Independent American Fuel Note Holders, and the trustees of the debtors, Inland Gas Corporation and Kentucky Fuel Gas Corporation] to dismiss the appeals in these seven cases, which were heard together, and on the opposition of the Securities and Exchange Commission and the several parties joining it in opposition to the dismissal of the appeals. This opposition, of course, involves opposition to the plan adopted in the district court and to its confirmation.

This appellate court has heard oral arguments of four attorneys in favor of the motions to dismiss and those of five attorneys opposing the dismissals. There have been considered also some twenty briefs filed by the attorneys for and against the motions.

The full history of this long-drawn-out litigation is disclosed by the numerous opinions of this court: *In re American Fuel & Power Company*, 122 F. (2d) 223 (C. A. 6); *Columbia Gas & Electric Corporation* v. *United States*, 151

F. (2d) 461 (C. A. 6); *In re American Fuel & Power Company, et al.*, 151 F. (2d) 470, affirmed by the Supreme Court, sub nom *Vanston Committee* v. *Green*, 329 U. S. 156; *Columbia Gas & Electric Corporation* v. *United States, et al.*, 153 F. (2d) 101 (C. A. 6); *In re Inland Gas Corporation, et al.*, 187 F. (2d) 813 (C. A. 6); *In re Inland Gas Corporation, et al.*, 208 F. (2d) 13 (C. A. 6); *In re Inland Gas Corporation; Harbison* v. *Williamson, et al., Vanston* v. *Williamson, et al.; Kern* v. *Williamson, et al.; Green, et al.* v. *Vanston, et al.*, 211 F. (2d) 381 (C. A. 6), certiorari denied, sub nom *Kern* v. *Vanston*, 348 U. S. 840; *In re Inland Gas Corporation, et al.*, 217 F. (2d) 207 (C. A. 6); *In re Inland Gas Corporation, et al.*, 241 F. (2d) 274 (C. A. 6), certiorari denied 355 U. S. 838 (1957).

Upon the last remand to the United States District Court, District Judge Ford had a full hearing with all interested parties appearing by counsel to consider whether a proposed plan, presented by the trustees of the several debtor corporations involved, is fair, equitable and feasible. Upon conclusion of the hearing, the district court entered an order finding the plan fair, equitable and feasible.

On June 2, 1958, the United States District Court entered an order confirming the plan of reorganization and overruling all objections to the plan and to its confirmation. It is obvious that the district judge attempted to the best of his ability and understanding—and we think successfully—to apply the principles stated in our last opinion [241 F. (2d) 374] and to put into full effect the mandate of this court. The evaluation which he put on the properties in issue was supported by substantial evidence and it cannot be said that his decision to follow the evaluation which he adopted upon expert testimony, rather than that of the Securities and Exchange Commission, was clearly erroneous. On the contrary, we find that the dis-

trict judge exercised sound discretion in adopting the evaluation which he did, upon the basis of the expert evidence before him.

We are of opinion, further, that Judge Ford appropriately applied the adjudication of this court in 241 F. (2d) 374, with respect to post-bankruptcy interest and all other issues before him. Motions to dismiss are appropriate in the circumstances. *Long Beach Dock & Terminal Co.* v. *Pacific Dock & Terminal Co.*, 98 F. (2d) 833, 835 (C. A. 9), certiorari denied 305 U. S. 1020; *Securities and Exchange Commission* v. *Vacuum Can Co.*, 157 F. (2d) 530, 532 (C. A. 7), certiorari denied 330 U. S. 820.

The appeals are dismissed; and the judgment of the district court confirming the plan of reorganization is affirmed.

Appendix B

Judgments

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 13,657

PAUL E. KERN, etc.,

Appellant,

—v.—

ERN WILLIAMSON, JR., Trustee of Inland Gas Corporation, et al.,

Appellees.

Before:

SIMONS, MARTIN and MILLER,

Circuit Judges.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the appeal be and it is dismissed; and the judgment of the District Court confirming the plan of reorganization is affirmed.

Approved for entry:

/s/ JOHN D. MARTIN
U. S. Circuit Judge

Filed
January 15, 1959